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THE
LAW JOURNAL REPORTS

FOR
THE YEAR 1838:

COMPRISING
REPORTS OF CASES

IN THE COURTS OF
**Equity, and Bankruptcy, Queen's Bench, Common Pleas,
Exchequer of Pleas, and Exchequer Chamber,**

FROM
**MICHAELMAS TERM, 1837, TO TRINITY TERM, 1838,
BOTH INCLUSIVE.**

**EDITED BY MONTAGU CHAMBERS, OF LINCOLN'S INN, ESQ.
BARRISTER-AT-LAW.**

VOL. XVI.

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MDCCCXXXVIII.

JUDGES, &c.

FROM MICHAELMAS TERM, 1837, TO TRINITY TERM, 1838, INCLUSIVE.

IN THE COURT OF CHANCERY.

The Right Hon. LORD COTTENHAM, Lord High Chancellor.
The Right Hon. LORD LANGDALE, Master of the Rolls.
The Right Hon. Sir LANCELOT SHADWELL, Knt., Vice Chancellor.

IN THE COURT OF REVIEW, IN BANKRUPTCY.

The Right Hon. THOMAS ERSKINE, Chief Judge.
The Hon. Sir JOHN CROSS, Knt.
The Hon. Sir GEORGE ROSE, Knt.

IN THE COURT OF QUEEN'S BENCH.

The Right Hon. THOMAS LORD DENMAN, Lord Chief Justice.
The Hon. Sir JOSEPH LITLEDALE, Knt.
The Hon. Sir JOHN PATTESON, Knt.
The Hon. Sir JOHN WILLIAMS, Knt.
The Hon. Sir JOHN TAYLOR COLERIDGE, Knt.

IN THE COURT OF COMMON PLEAS.

The Right Hon. Sir NICHOLAS CONYNGHAM TINDAL, Knt., Chief Justice.
The Hon. Sir JAMES ALLAN PARK, Knt.
The Right Hon. Sir JOHN BERNARD BOSANQUET, Knt.
The Right Hon. Sir JOHN VAUGHAN, Knt.
The Hon. Sir THOMAS COLTMAN, Knt.

IN THE COURT OF EXCHEQUER.

The Right Hon. LORD ABINGER, Lord Chief Baron.
The Hon. Sir WILLIAM BOLLAND, Knt.
The Right Hon. Sir JAMES PARKE, Knt.
The Hon. Sir EDWARD HALL ALDERSON, Knt.
The Hon. Sir JOHN GURNEY, Knt.

Sir JOHN CAMPBELL, Knt., Attorney General.
Sir ROBERT MONSEY ROLFE, Knt., Solicitor General.

REPORTS
OF
CASES ARGUED AND DETERMINED
IN THE
Court of Chancery.

BY
CHARLES BEAVAN, Esq., PHILIP TWELLS, Esq., and
FREDERICK JAMES HALL, Esq.
BARRISTERS-AT-LAW.

1 VICTORIA.

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CASES ARGUED AND DETERMINED

IN THE

Court of Chancery.

MICHAELMAS TERM, 1 VICTORIA.

M.R. }
Nov. 2. } PARSONS v. ROBERTSON.

Production of Papers—Affidavit—Practice.

On a motion for the production of papers, letters, &c., the Court permitted an affidavit to be read by the defendant, to shew that some particular letters had been written by him to his solicitor, subsequently to the institution of the suit.

This bill was filed for the specific performance of an agreement, entered into by the defendants, to take a lease. The defendants, by their answer, admitted having in their possession a case for the opinion of counsel, and the letters and copies of letters, stated in the schedule to their answer, which related to the matters in the bill mentioned; "however, the defendants said, that the aforesaid case or statement for the opinion of counsel was prepared and submitted to counsel in contemplation of, or with reference to, or in the course of, this suit; and that several of such letters and copies of letters were written subsequently to the institution of this suit; and they, therefore, submitted, that they ought

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not to be compelled to produce such case or statement, or any of such last-mentioned letters, or copies of letters," &c.

Mr. Rogers now moved for the production of all the letters and documents stated in the schedule.

Mr. Hayter, *contrà*, resisted the production of the case, and opinion, and the letters written by the defendants to their solicitor subsequently to the institution of the suit; and he read an affidavit specifying which of the letters came within that class.

Mr. Rogers opposed the reading of the affidavit, contending, that it was quite novel to permit a defendant to explain his answer by an affidavit; but—

The MASTER OF THE ROLLS said, it was not novel, on such a motion, to introduce by affidavit something as a defence against the order for the production of papers, and that the defendants must not be deprived of the benefit of their defence by an accidental slip; he, therefore, ordered the production of all the documents, except the case and opinion, and the letters of the defendants to their solicitor, specified in the affidavit to have been written subsequently to the institution of this suit.

B

Note.—An affidavit was read for the purpose stated in the text in the case of *Hughes v. Biddulph*, 4 Russ. 190; and in *Davis v. Harford*, Rolls, Jan. 21, 1836, on a motion for the production of papers, Lord Langdale gave leave to supply a defect in the answer by affidavit.

Mr. Tinney, for the plaintiff.

Mr. Piggott, for the defendant.

V.C. }
Nov. 7. } GAUNT v. TAYLOR.

Executors—Double Costs.

A motion had been refused and a petition dismissed, with costs, payable by the plaintiff. The defendants, who were executors, had defended separately, and the Master had allowed two sets of costs. A petition praying that it might be declared, that one set of costs only ought to have been allowed, was refused, with costs.

This was a creditors' suit, in which part of the estates of the testator in the cause had been sold, and the money ordered to be paid into court. A motion had been made by the plaintiff before the Vice Chancellor, and a petition had also been presented by him at the Rolls, to have that order varied; and the motion had been refused, and the petition dismissed, with costs. The executors had defended separately, and the Master had allowed them two sets of costs, incurred upon the motion and petition. The plaintiff now presented a petition, that it might be declared that the Master ought not to have allowed two sets of costs, and that it might be referred back to him to review his report. The usual decree had been made in June 1831, by which further directions and costs were reserved.

Mr. Knight Bruce, in support of the petition, insisted, that the question of the costs ought not to be decided till the cause came on for further directions, when the Court would be able to decide whether there was any good reason for the executors defending separately; that there appeared to be no special circumstances in this case which could render such a proceeding proper on the part of the executors, and that, in the absence of any particular reason for so doing, one set of costs only ought to be

allowed; that the Master had not intended to express any opinion that two sets of costs were proper in this case, but had considered that question as determined by the order pronounced by the Court.

The VICE CHANCELLOR.—The motion was refused with costs; therefore the question of costs on this point is not reserved, and, consequently, these costs will not come into the question of general costs. It seems to me, that you are to make out that the parties ought not to have their costs separated. You obtain an order for the payment of the purchase-money; you then seek to vary that order in a manner which the Court does not choose to grant; you then virtually, though not in form, endeavour to get that which was done here reversed by the Master of the Rolls, who dismissed the petition with costs. Your case is not *prima facie* such a one as is entitled to the favour of the Court.

Mr. Jacob, Mr. Elderton, and Mr. Parker, appeared for different parties, to oppose the petition, but were not called on.

Petition dismissed, with costs.

V.C. }
Nov. 8. } HOLLINGWORTH v. SIDEBOTTOM.

Partition.

The circumstance of a tenant in common being a person of weak intellects, will not prevent the Court from making a decree for a partition as against such party.

This was a bill for a partition. A testator had devised his real estates to his three daughters, as tenants in common; and this bill was filed by two of them against the third. The defendant, who had attained her majority, was a person of weak intellects, but had not been found so by inquisition, and had put in an answer by a guardian. The question was, whether the Court would make a decree for a partition as against her.

Mr. Mylne, for the plaintiffs, submitted, that although no order could be made for a conveyance from the defendant, still the

Court could make the usual order for a commission to make partition, and that the lands should be held in severalty.

Mr. Duckworth appeared for the defendant.

The VICE CHANCELLOR said, there was no objection to make such a decree as was proposed, reserving further directions.

L.C. }
Jan. 16; Nov. 15. } SKEELES v. SHEARLY.

Judgment—Notice—Power of Appointment.

The lien of a judgment creditor on the real estate of his debtor, where execution has not been taken out, is defeated by the exercise of a general power of appointment given to the debtor in the conveyance of the estate, by which the estate was limited in default of appointment, to the usual uses to bar dower; and that, notwithstanding the appointee had notice of the judgment.

This case will be found reported in 6 *Law J. Rep.* (N.S.) *Chanc.* p. 21.

The facts of it were simply these:—An estate was limited to such uses as William Cook should appoint, and, in default of appointment, the fee was limited to Cook in such manner as to bar dower. In 1828, the plaintiff, *Mrs. Skeeles*, obtained a judgment for 1,000*l.* against Cook, which was duly entered, docketed, and registered in the office for registration for the county of Middlesex; and in November 1830, the plaintiff issued out a writ of *elegit* on her judgment. In July 1830, Cook had appointed the property to the defendant *Shearly*, by way of mortgage, for securing 4,500*l.*; and the mortgage was not to be redeemed before 1838.

On the 22nd of November 1830, the sheriff of Middlesex extended a moiety of the estate for the benefit of the plaintiff, but did not give her actual possession of it. She, therefore, brought an action of ejectment against the tenant in possession; but being nonsuited by means of the legal estate vested in *Shearly*, under the appointment contained in the mortgage deed, she thereupon filed this bill, alleging that

the defendants had notice of her judgment before it was registered, and before the mortgage to *Shearly*; and also alleging, that it had been agreed between *Shearly* and Cook, that 1,000*l.*, part of the 4,500*l.*, was to be applied in satisfaction of the plaintiff's claim. One of the persons who were present at the payment of the mortgage money deposed, that the 1,000*l.* was retained by one of the defendants, to meet the plaintiff's claim, if the estate should prove to be liable to pay it.

The bill prayed, that it might be declared that the plaintiff, by virtue of her judgment, had a lien on the estate prior to any incumbrance of the defendants; and that they might deliver up possession to the plaintiff, and might be restrained from setting up any legal estate to defeat an action of ejectment; or if the Court should determine that the defendants had a charge prior to her own, then that she might be at liberty to redeem such prior charge.

The argument proceeded on the assumption, that the defendants had notice of the judgment.

The Vice Chancellor dismissed the bill with costs; and the plaintiff had appealed from his Honour's decree.

Mr. Wigram and *Mr. Stuart* appeared for the plaintiff, and contended, first, that as Cook in effect was the unrestricted owner of the property, he could not in equity defeat the plaintiff's judgment by an execution of his power of appointment;—secondly, that the defendant having notice of the judgment, took the estate subject to the plaintiff's rights; and, thirdly, that the plaintiff was at all events entitled to redeem the mortgage.

Mr. Knight, *Mr. Jacob*, *Mr. Bazalgette*, *Mr. Wakefield*, and *Mr. Roupell*, appeared for the defendants; but—

The LORD CHANCELLOR did not think it necessary to hear them, and said, he would look into the authorities before he gave his judgment; and on the 15th of November 1837, his Lordship stated, that in this case he concurred in opinion with the Vice Chancellor; that at law estates limited in default of appointment, ceased, and were defeated on the execution of the power of appointment, and that the estates appointed under the power took effect in

the same way as if they had been contained in the deed which created the power ; and that, therefore, the estate of Cook which the plaintiff sought to recover in this suit, had not any longer existed after the execution of the power : that this was decided in *Doe dem. Wigan v. Jones* (1), and there was no authority for saying, that the same rule did not prevail in equity : that although the power under which the defendant claimed was a general power, and the property which was subject to it was subject to be applied for the benefit of creditors, yet that creditors had not so good an equity as a purchaser for valuable consideration — *George v. Milbanke* (2). That the principle on which a recovery was held to give effect to prior charges created by the tenant in tail, did not apply here ; because the estate which was sought to be affected by these charges did not exist when they were created, and the estate of the defendant never was the property of William Cook. That with respect to the second point, he considered the alleged notice of the judgment quite immaterial ; that the bill supposed a species of trust was created as to the 1,000*l.* ; but the plaintiff was no party to that transaction ; and, therefore, whether the whole purchase-money was paid to Cook, or whether 1,000*l.* was retained to be paid to some other party, the plaintiff would obtain no lien. That with respect to the last point—namely, that the plaintiff was entitled to redeem the mortgage, it appeared by the mortgage deed that it was stipulated that the mortgage should not be redeemable till 1838. That the plaintiff's case had failed in every point ; and he must, therefore, dismiss the appeal, with costs.

V.C. }
Nov. 18. } SCHOLEFIELD v. HEAFIELD.

Infant Defendant—Demurrer of Parol—
Statute 11 Geo. 4. & 1 Will. 4. c. 47.

In a decree for the sale of real estate, of which an equitable mortgage had been made, and which had since devolved on the infant,

(1) 10 B. & C. 459 ; s. c. 8 Law J. Rep. K.B. 214.

(2) 9 Ves. 196.

heir-at-law of the mortgagor :—Held, that a day was not to be reserved for the defendant to shew cause against the decree, on his attaining his majority.

This suit was instituted for the purpose of obtaining the sale of some real estate, of which an equitable mortgage had been made to the plaintiff. The mortgagor had since died, and his heir-at-law, on whom the property had devolved, was an infant. The question was, whether a day should be reserved in the decree for the infant to shew cause against the decree.

Mr. Jacob, Mr. G. Richards, Mr. Knight, and Mr. S. Sharpe, appeared for the different parties. *Powys v. Mansfield* (1) was cited.

The VICE CHANCELLOR, after having conferred with the Lord Chancellor on the subject, decided, that the old form of the decree made in similar cases was no longer applicable ; and that, where there was a suit to take accounts and sell estates belonging to an infant, it was not proper to reserve a day to shew cause.

V.C. }
Nov. 24. } BAINBRIDGE v. BAINBRIDGE.

Will—Construction—Gift of Residue.

A testator, after bequeathing some pecuniary legacies, and some specific articles, directed "the residue" to be given to A :—Held, that A. was entitled to the general residue of the testator's estate, and not the residue of such articles only as were ejusdem generis.

A, being entitled to the residue of a testator's estate, but which was not ascertained, directed, that if any "debts" were due to her at her decease, her executors should pay them to her children :—Held, that the residue to which she was entitled passed to her children, under that bequest.

James Bainbridge, by his will, after bequeathing a few pecuniary legacies, and making several specific bequests of per-

(1) 6 Sim. 687 ; s. c. 5 Law J. Rep. (N.S.) Chanc. 297.

sonal articles, wearing apparel, &c., concluded his will as follows:—"And the residue to be given to my mother Grace Bolt; my books to be equally divided between Richard and Samuel; all the expenses that may be incurred by my funeral, to be paid equally, share and share alike by Richard, Eliza, Samuel, and Mrs. Samuel Bainbridge."

The testator died in June 1827. No part of his residuary estate had been paid over to his mother, nor had the amount of it been ascertained till after her decease. By her will, dated in May 1830, she directed as follows: "if any debts due me at my decease, I request my executors will collect and pay into the hands of my children." Her will contained several specific decrees and bequests, but no gift of residue. The testatrix died in May 1834.

Two questions were submitted to the Court;—first, whether the language made use of in the will of James Bainbridge, was sufficient to dispose of the general residue of his estate, or was only applicable to the residue of such things as were *ejusdem generis* with the articles which the testator had specially mentioned before; and, secondly, in case his general residue passed to Grace Bolt, whether it was disposed of by the bequest in her will of debts due to her.

Mr. Knight Bruce, Mr. Loftus Wigram, Mr. Turner and Mr. Wray, appeared for the different parties.

The VICE CHANCELLOR held, that the general residue of James Bainbridge's estate passed under the bequest of residue contained in his will; and that such residue also passed under the will of Grace Bolt, as a debt due to her.

M. R. }
 April; }
 May 27; } HODGSON v. HODGSON.
 Nov. 25. }

Principal and Surety—Interest—Trustee—Notice.

B. and C. were jointly bound as sureties for A; D, the wife of A, for good consideration, charged her separate estate to indemnify B. from all losses, &c., and a loss having

been sustained, was borne by B. alone, who afterwards, without the concurrence of D, released C, his co-surety:—Held, that D. was thereby released from the moiety of the losses payable by C.

A deed, after reciting that A. had agreed to charge certain property with all sums which B. should pay as surety for a third party, together with interest on all such payments, and all such costs, &c. as he might sustain, &c., proceeded to charge the property with the payment of all such sums, costs, &c. with interest as aforesaid:—Held, that interest was not payable on the costs, &c.

By the same deed, A. agreed that B. should insure her life, and that the costs of such insurance, and the payments for keeping the same on foot, should be paid out of the property charged; and she directed the trustees to make the necessary payments for effecting and keeping on foot the policies. The trustees did not make the payments, but the policy was kept on foot by B.:—Held, that he was entitled to interest thereon, at 4l. per cent.

A trustee for a married woman, having received notice of a charge executed by her, was held personally liable for payments afterwards made to her; and that, notwithstanding the validity of the charge was disputed by her, and no application had been made for an injunction.

This bill was filed by Samuel Hodgson, for the purpose of obtaining out of the separate estate of a *feme covert*, the benefit of a certain security, which she had executed under the following circumstances:—In the year 1824, the defendant, William Hodgson, was appointed committee of the estate of Ann Barrow, a lunatic, and on the 8th of June in the same year, he, together with Henry Hodgson and the plaintiff, Samuel Hodgson, as his surety, entered into a recognizance in the sum of 900*l.*, defeasible on William's duly accounting for the lunatic's estate, which should come to his hands; he did not duly account, and in April 1827, he became embarrassed in his circumstances, and a commission of bankruptcy issued against him, and very soon afterwards orders were made in the matter of the lunacy requiring him to pay considerable sums of money into court; he was desirous to supersede the commission

of bankruptcy, and to relieve himself from the pressure of the orders. No order had been made against the surety, but from some transaction subsisting between William and Henry Hodgson, it seemed that William thought he had a right to call on Henry to pay. No transaction of that kind was subsisting between William and the plaintiff Samuel, and it was thought desirable to induce Samuel to pay voluntarily his share at least of the debt in the lunacy. The defendant Susannah, the wife of William, was entitled for her life, for her separate use, to the residuary estate of Rice Pritchett, of whose will the defendant Daniel Letsam was executor; and on the 20th of June 1827, Susannah executed a deed-poll of that date, whereby it was recited, among other things, that two orders had been made for the payment, by William Hodgson, of 160*l.* 16*s.* and 537*l.* 9*s.* 1*d.*, respectively, which sums William Hodgson, by reason of his bankruptcy, was unable to pay, and that the plaintiff Samuel Hodgson was desirous to pay his moiety of those sums, and of what further balance should be found due to the estate of the lunatic, Henry Hodgson being to discharge the other moiety thereof; and that Susannah had agreed to charge her life interest in Pritchett's estate, by way of security to Samuel Hodgson, and to give the executors authority to pay him, out of the rents of the estate, all such sum and sums of money as he might be liable to pay, and should pay, as well for his moiety or share of the said several sums of 160*l.* 16*s.* and 537*l.* 9*s.* 1*d.*, so due and owing by the said William Hodgson, as such committee of the estate of the said lunatic, as of all such further sum and sums of money as should be found due and owing to the estate of the said lunatic, on passing the further accounts of the said William Hodgson, *together with interest on all such payments* by him, the said Samuel Hodgson, and all such costs, charges, and expenses, as he may sustain, pay, incur, or be put unto, in consequence of his being liable as a surety for the said William Hodgson. Susannah also agreed that an insurance on her life for 400*l.* should be effected, and that the annual premiums for keeping the same on foot, should be paid out of her life estate; and further, by means of her life interest, and

the rents and annual produce of the residue of the separate estate and the insurance, to indemnify and save harmless Samuel Hodgson of and from any further or other payment, which he might be compelled to pay in any respect whatever, in regard to the other moiety of the sum due, or to be found due, to the lunatic's estate. The deed-poll then witnessed, that Susannah charged all her life interest to pay and make good all and every such sum and sums of money, costs, charges, and expenses whatsoever, as he the said Samuel Hodgson should be obliged to pay, expend, incur, or be made liable to, as such surety as aforesaid, *with interest as aforesaid* on all such payments, and to save harmless, and fully indemnify him, the said Samuel Hodgson, his executors and administrators, as well from his own part, or share, or contribution of or towards the said several payments and liabilities, but also for or in respect of the other moiety, in case he should be compelled to pay the same, or any part thereof; and she directed the executors to pay out of the rents yearly, until the money intended to be secured should be repaid, the sum of 50*l.* a year, and such further sum as should be required for effectuating or keeping up the policy of insurance; and then there was a proviso, that Samuel should prove the amount of what he should have to pay as surety, as a debt against the estate of William, and apply the dividends in reduction of the security, and that when all this had been paid, the policy should be assigned to trustees for Susannah. The plaintiff, in pursuance of the agreement, with a view to which this deed had been executed, and in discharge of his recognizance, paid several sums of money in respect of his being surety for Henry Hodgson. Henry Hodgson did not appear to have paid anything, so that Samuel's payment was not confined to his own contributory share, but was made in respect of the whole debt due from William; and as William paid nothing, and as the commission against him was according to the intention, before the execution of the deed, superseded, Samuel received nothing from any one in respect of his payment.

After the execution of this deed, some negotiations for a varied security took place, but they did not appear to have

come to any satisfactory conclusion. Samuel Hodgson having made his payment, was entitled to the benefit of the security from Susannah, and was also entitled to contribution from Henry, and in this state of things, Samuel being a co-surety with Henry, and therefore having the right of contribution against Henry, and also the right of indemnity against Susannah, executed an indenture, dated the 14th of August 1829, by which, in consideration of the full payment of the debt of 53*l.* 8*s.* 2*d.*, which was due to the plaintiff from Henry, and for 8*l.* costs thereon, and for divers other good considerations not specified, him thereunto moving, the plaintiff covenanted and agreed that he would not prosecute Henry either for the debt of 53*l.* 8*s.* 2*d.*, or for or on account of 160*l.* 16*s.*, and the other sums ordered, or to be ordered, to be paid in the lunacy, or for any share or contribution of the same; and that if any suit or proceeding should be commenced against Henry by Samuel, or by any other person, on account of such payment or contribution, then every debt owing to Samuel, touching any of the matters therein mentioned or referred to, should be thereby acquitted and be discharged; and the indenture was to operate as a release thereof, and the plaintiff thereby indemnified Henry against the payment of any further sum which might be ordered to be paid in the lunacy, on account of the bankruptcy of William.

In July 1827, the plaintiff gave Mr. Letsam, the trustee, notice of his deed, and required him not to pay over the whole 50*l.* to Mrs. Hodgson, but to retain the 50*l.* a year, and the amount of premiums; this he had neglected to do.

This bill was filed by Samuel Hodgson, to obtain payment, out of the separate estate of Mrs. Hodgson, of the monies which he had paid in respect of the defalcation of her husband in the lunacy, and the sums paid for the policy of assurance, and certain costs, &c.

Mr. Pemberton and *Mr. James Russell*, for the plaintiff.

Mr. Kindersley and *Mr. Simpson*, for Mrs. Hodgson, contended, first, that the deed was not valid, being made without consideration; and, secondly, that if valid,

it was only effective to the extent of one moiety of the monies claimed, as by the release of Henry, who was a surety, Mrs. Hodgson was released.

Mr. Richards, for the trustee, Mr. Letsam, contended, that he was not liable to repay to the plaintiff the monies already handed over to Mrs. Hodgson, on the ground that the plaintiff had not taken proper measures to prevent it by applying for an injunction; besides which, the trustee could not be expected to adjudicate between the parties.

The MASTER OF THE ROLLS—[after stating the case].—It is alleged, on behalf of the defendant, that the deed is not valid, because, as it is said, it was executed without consideration, and was obtained by surprise. Samuel, it is said, was already bound to pay the debt of William; consequently William was placed in no better situation by this deed; but on consideration of the evidence, and having regard to the situation of the parties, the importance to William of being immediately released from the pressure of the orders, and the circumstances deposed to by Mr. Gem, I am of opinion the deed is valid. As to the effect of the deed, it appears to me to have been intended that Samuel and Henry should pay the debt in equal moieties; but it was, at the same time, contemplated, that Samuel might be compelled to pay the moiety which Henry was intended to pay, and the security was intended to cover not only the share which Samuel intended to pay for himself, but also the share which he might be compelled to pay for Henry; but I think the security was to be made effectual by applying, out of the income of Susannah, 50*l.* a year towards the debts, and the sum requisite to keep up the insurance on her life of 400*l.*, and such further sums as Samuel should pay; and it was not intended, and it is not the effect of the deed, that the deed should be made effectual by the application of the whole of the income of Susannah.—[His Lordship stated the subsequent transaction between the plaintiff and Henry Hodgson, and the release.]—The circumstances under which this deed was executed do not very clearly appear, but

it is very obvious, as between Henry and the defendant William, there were transactions, in respect of which it was considered that William, though the principal debtor in the lunacy, had a right to call on Henry, who, in that respect, was only his surety, to pay a portion of that debt; and this appears to have been known to Samuel. Now, supposing Samuel to have had, what I think he had under the deed of 1827, a claim for what he should be compelled to pay in the lunacy for William, it is clear that he had a right to contribution from Henry; and it is clear also, that Susannah being under the obligation to make good his payment, had a right to the benefit of his remedy against Henry. By his release of Henry, he deprived her of that benefit. The question is not now how far the claim of Samuel against William, the principal debtor, would have been affected by the release of Henry, the co-surety; Susannah was herself only a surety, and as surety she plainly relied on the contribution of Henry. As to her, I think, that Samuel must be considered as a principal debtor, and Henry was jointly and severally liable with him. They were bound by their respective liabilities before he was in any way affected by them; and it appears to me that Samuel could not, without her consent, release Henry, and at the same time continue his claim against her, for that which he had previously a right to recover from him. I do not particularly advert to the alleged insolvency of Henry, the evidence of which is scarcely to be relied on, being the evidence of Henry himself, and because, in the very act of giving the release, Samuel obtained full payment of his own debt, and also because, in a case such as this, I think Susannah ought to have had an opportunity of judging for herself, whether she would or not, having regard to the circumstances of Henry, prosecute her claim for contribution against him.

I think Samuel was not entitled to release Henry with a view to make Susannah pay; I think, therefore, the plaintiff, by executing the deed of August 1829, exonerated the defendant Susannah from so much of his claim against her, as arose from payments in respect of which he had a right

to contribution from Henry; and the deed of June 1829 is to stand as a security for the payment of only one moiety of the payments which Samuel has made in respect of the balances due from William, and for the payment of the costs properly incurred by him in the matter of the lunacy. The Master is therefore to take an account of what is due in respect of the 50*l.* a year, and the amount of what shall be so found due must be paid by the defendant Mrs. Hodgson, in reduction of the plaintiff's demand, and the sum of 50*l.* a year is to be annually paid by the defendant Letsam, in further reduction thereof. The plaintiff is also entitled to have the policy of insurance on the life of Mrs. Hodgson kept on foot at the expense of her estate, or so much as shall remain due after paying what is found due on the 50*l.* a year.

As to Letsam, (his Lordship said,) my opinion is, that after notice Letsam had no right to pay this money over to Mrs. Hodgson; he ought to have secured it, if there was a doubt; and, I think, he is answerable for it. He took on himself to act as if the deed was altogether invalid, and he did so at his own peril.

Costs out of the separate estate.

November 25.—The parties disagreeing as to the minutes of the decree, the cause was again set down.

Mr. Pemberton and Mr. James Russell contended, that the plaintiff was entitled to interest on the amount of premiums paid by him, and also on the costs and expenses incurred, to be calculated from the times of payment.

Mr. Kindersley and Mr. Simpson, contra, contended, that there was no agreement to pay interest on these sums, and that consequently the defendant was not liable for the interest.

The MASTER OF THE ROLLS, after referring to the terms of the deed, decided, that the plaintiff was entitled to interest at 4*l.* per cent. on the premiums, but not on the costs, &c.

L.C.
Dec. 13, 16, 18, 19,
1836.
Nov. 17,
1837.

} POWYS V. MANSFIELD.

Will—Settlement—Satisfaction of Legacy—Double Provisions—Evidence—Republication.

*An uncle, by his will, directs 10,000*l.* to be set apart, out of a fund to be formed by accumulations of personal and other specific property, which he bequeaths to trustees for the purpose of accumulation; and in case of those funds being insufficient, then he charges the reversion of certain freehold estates, subject to the death of himself and his brother, without issue male, with such sums as shall make up the deficiency: the sum of 10,000*l.* to be held on certain trusts for the benefit of a niece, and any husband whom she might leave surviving, and any children she might have: he shortly afterwards, on the marriage of his niece, charges the same reversion with the payment to the trustees of her marriage settlement, of a like sum of 10,000*l.*, subject to the same contingency of the death of himself and his brother, without issue male; such sum to be held on certain trusts for the niece, and the then intended husband, and the children of that marriage only, exclusively of an eldest son:—Held, overruling the decision of the Court below, that the provision proposed to be made by the will was satisfied by the provision made by the settlement, and was not set up again by a codicil, which was executed subsequently to the marriage of the niece, and by which the will was expressly confirmed.*

The circumstances of a child having lived with, and been maintained and educated by its father, are not of themselves sufficient to prevent another person being considered as having placed himself in loco parentis to the child, in a case where such person has supplied the greater part of the father's income.

Extrinsic evidence is admissible to prove the facts on which the presumption, that a party intended to put himself in loco parentis depended; and the declarations of the party alleged to have put himself in that situation, are also admissible for the same purpose.

NEW SERIES, VII.—CHANC.

Whether the declarations of a party in loco parentis are admissible to shew his intention as to a particular provision, made for the object of his bounty—quære.

A legacy, which has been revoked, adeemed, or satisfied, will not be revived by a subsequent codicil, confirming the will by which the legacy was given.

This case came before the Lord Chancellor on appeal from the decision of the Vice Chancellor. The facts of it will be found reported in 5 *Law J. Rep.* (N.S.) *Chanc.* 153, and also in 6 *Sim.* 528.

It should be stated, that on the marriage of Sir Richard Simeon with the eldest daughter of Sir Fitzwilliam Barrington, which took place in 1813, Sir John Barrington charged the reversion in fee of the Swanston estate, with the payment to the trustees of Lady Simeon's marriage settlement of a sum of 10,000*l.*, in trust for her and her intended husband successively for life, and after their death, for their children. And on the occasion of that marriage, Sir John also made his will, by which he devised his reversion in the same estates to trustees for a term of 1,000 years, to raise 50,000*l.*, which sum he directed to be divided equally among the five younger daughters of his brother Fitzwilliam, on their attaining twenty-one or marrying; and subject thereto, he settled the reversion on Lady Simeon and her sisters, according to their seniority, successively for life, with remainder to their first and other sons successively in tail male.

Sir Charles Wetherell, Mr. Kindersley, Mr. Wray, and Mr. Bathell, appeared in support of the appeal, and—

Mr. Knight, Mr. Jacob, Mr. Walker, Mr. Chandless, and Mr. Pole, in support of the decree.

NOV. 17, 1837.—THE LORD CHANCELLOR.—The facts of this case being already reported, it is not necessary for me to detail them further than may be necessary to explain the observations I shall have to make on some of the points which have arisen. The case is of much importance, not so much on account of the property in

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question, which, however, is considerable, as because it raises questions as to which the rules and principles of this Court are not very easy to be laid down, and defined with accuracy; and as to which, unfortunately, the authorities are not very consistent. Not finding myself able to concur in the judgment of the Vice Chancellor, I have myself carefully examined the grounds on which it was founded, and I have anxiously considered the authorities applicable to the subject.

Some points have been properly assumed, and may be considered as settled points on which the argument on each side must proceed. It is not disputed that if Miss Julia Barrington had been a daughter, instead of being a niece of Sir John Barrington, the provision made for her on her marriage would have been an ademption of the legacy given to her by the will of 1817. I do not understand the Vice Chancellor to have entertained a doubt on this part of the subject. If that be so, I apprehend it is equally clear (and so I understand the Vice Chancellor to think), that the same consequences will follow, if Sir John Barrington ought to be considered as having placed himself *in loco parentis*. But the Vice Chancellor rests his judgment principally on this, that Sir John Barrington ought not to be considered as having placed himself *in loco parentis*. The first point, therefore, is, whether that be correctly so assumed; and no doubt the authorities leave some obscurity as to what is considered to be meant by the expression usually adopted by one being *in loco parentis*. Lord Eldon, in *Ex parte Pye* (1), has given to it a definition, which I readily adopt, not only because it proceeds from his high authority, but because it seems to me to embrace all that is necessary to work out, and carry into effect the object and meaning of the rule. Lord Eldon says, "It is a person meaning to put himself *in loco parentis*, in the situation of the person described as the father of that child." But this definition must, I conceive, be considered as applicable to those parental offices and duties to which the subject in question has reference

—namely, to the office and duties of a parent to make a provision for the child. The offices and duties of a parent are infinitely various, some having no connexion whatever with making a provision for a child; and it would be very illogical, from the mere exercise of any such offices and duties by one not the father, to infer an intention in such person to assume also the duties of providing for the children; the relative situation of the friend and the father, may render this unnecessary, and the other benefits most essential. Sir William Grant's definition is, "A person assuming the parental character, or discharging parental duties," (2) which may seem not to differ much from Lord Eldon, but I think it wants that, which, to my mind, constitutes the principal value of Lord Eldon's definition—namely, referring to the *intention*, rather than to the *acts* of the party. The Vice Chancellor says, "It must be a person who has so acted towards the child, as that he has thereby imposed on himself a moral obligation to provide for it," and it will not hold, when the child has a father, with whom it resides, and by whom it is maintained. Now, this seems to infer that the *locus parentis* assumed by a stranger must have reference to the pecuniary wants of the children, and that Lord Eldon's definition is so to be understood, and, so far I agree with him; but, I think, the other circumstances required are not necessary. The rule, both as applied to a father, and to one *in loco parentis*, is founded on presumed intention. If a father is supposed to intend to do that which, in duty, he is bound to do—namely, to provide for his children according to his means, so one who has assumed that part of the office of a father is supposed to do that which he assumed to himself the office of doing. If the assumption of the character be established, the same inference and presumption must follow. His having so acted towards a child as to raise a moral obligation to provide for it, affords a strong inference in favour of the assumption of that character; and, though the circumstances of that child having a father, with whom it resides, and by whom it is main-

(1) 18 Ves. 154.

(2) 19 Ves. 412.

tained, afford some inference against it, neither of these circumstances can be considered as conclusive.

If, indeed, the Vice Chancellor's definition were to be adopted, it would still be to be considered in this case, whether Sir John Barrington had not subjected himself to a moral obligation to provide for his brother's children, and whether such children can be considered to have been maintained by their father. A rich unmarried uncle, taking under his protection the family of a brother, who has not the means of adequately providing for them, and furnishing to such father the means of their maintenance and education, may surely be said to intend to put himself, for the purposes in question, *in loco parentis* to the children, though they may never, in fact, leave their father's roof. An uncle, so taking such a family under his care, will have all the feelings, and intentions, and objects with regard to providing for the children, which would influence him if they were orphans. For the purpose in question—namely, providing for them, the existence of the father can make no difference. If, then, it shall appear on the examination of the evidence, that Sir John Barrington did afford to his brother the means of educating, maintaining, and bringing up his children according to their condition in life; and, if the father had no means of his own, at all adequate for that purpose; that this assistance was regular and systematic, and not confined to casual presents, the repetition of which could not be relied on; that he held out to his brother and family, that they were to look up to him for a future settlement, it surely will follow, if it were material, that Sir John Barrington had so acted towards the children as to impose on himself the moral duty to provide for them; and that the children were, in fact, maintained by him, and not by their father.

But, it has been said, that Sir John Barrington would not have been guilty of any breach of moral duty, if he had permitted the property to descend to his brother. Undoubtedly he would not, because that would have been a very natural mode of providing for the children. But, if he had reason to suppose the brother would act

so unnatural a part as to leave the property away from his children. Sir John Barrington would have been guilty of a breach of moral duty towards the children in leaving the property absolutely to the father. I should, therefore, feel great difficulty in coming to the conclusion, that Sir John Barrington had not placed himself *in loco parentis* towards these children, even if I thought everything necessary for that purpose, which the Vice Chancellor has thought to be so.

But, adopting as I do the definition of Lord Eldon, I proceed to consider, whether Sir John Barrington did intend or mean to put himself *in loco parentis* to these children as far as related to their future provision. Parol evidence has been offered on two points: first, to prove the affirmative of this proposition; and, secondly, to prove, by declaration and acts of Sir John Barrington, that he intended the provision by the settlement to be in substitution of that in the will. That such evidence is admissible for the first of these purposes, appears necessarily to follow from the rule of presumption. If the acts of a party standing *in loco parentis*, are, in equity, to raise a presumption which would not arise from the same acts of another person not standing in that situation, parol evidence must be admitted to prove or disprove the facts on which the presumption depends—namely, whether in the language of Lord Eldon, "he *meant* to put himself *in loco parentis*:" and, as the fact to be tried is the intention of the party, his declarations, as well as his acts, must be admissible for that purpose. And, if the evidence establishes the fact, that Sir John Barrington did mean to place himself *in loco parentis*, it will not be material to consider whether his declarations of intention as to the particular provision in question, be admissible *per se*; because, the presumption against a double portion will, in that case, arise; and, as that presumption has been attempted to be rebutted by parol evidence, it certainly may be supported by evidence of the same kind.

I at present look at this evidence, merely for the purpose of seeing how far it supports the proposition, that Sir John Barrington meant, for the purpose of making

a provision for the family in general, and particularly for Miss Julia Barrington, to place himself *in loco parentis*. In the first place, it appears that Sir John Barrington allowed his brother 400*l.* a year, which he in 1797 voluntarily bound himself to pay during his life. I take no notice of Mr. Fitzwilliam Barrington's diary, as I do not consider that can be evidence between these parties, of the facts it contains, there being no proof that it ever came to the knowledge of Sir John. Sir John Barrington's bankers, however, prove the payment to the brother of large sums, in addition to his annuity. But his letter of the 11th of July 1818, referred to by the Vice Chancellor, is a most important document, shewing that he had taken his brother's family under his protection, and that his principal object in the appropriation of his property, was to provide for them; that he had always been preparing to supply his brother with cash *en masse*; that on Lady Simeon's marriage, he had made a disposal of the Isle of Wight property, for the benefit of his brother's family; and on Mrs. Powys's marriage, he had made another will, improved upon, as he concluded, by the destination of his tithe property in Essex, in trust, to form a fund to raise the very heavy demands that would press on the Isle of Wight estate: that in the framing of these wills, he had acted altogether free from any personal consideration, following the order of priority of birth as the rule for it. Part of these demands on the Isle of Wight estate, was the provision for Mrs. Powys; and it is to be observed, that he speaks of the object of the arrangement of 1817, as being to provide an additional fund to answer the pre-existing demand, and not intending to create a new one. The testimony of the witnesses carries this part of the case somewhat further, and proves that the brother's family were, in fact, maintained by Sir John Barrington, the income of the brother not exceeding 400*l.* or 500*l.*, per annum, and Sir John making up the deficiency to cover the expenses of the family, which were considerable. It cannot be material whether the music-master, or the drawing-master, or the dress-maker, received what was due to them from the hands of their father, when

it appears their uncle furnished the means. The arrangements on Lady Simeon's marriage in 1813, are important, as shewing that at that time Sir John Barrington treated his brother's family as his own, in the disposal of his property, and appointing 10,000*l.*, as the portion of each of his younger nieces. The letter of the 11th of July 1818, shews, that at the time of making the will of the 28th of March 1817, Sir John Barrington knew of the intended marriage of his niece Julia; and such will was made, as he says, on the occasion of such marriage. At that time, therefore, the will proves that he intended 10,000*l.*, and no more, should be the portion of Mrs. Powys. Nothing can more completely shew the assumption of the office of parent towards them, so far as relates to the disposal of property, than this will. Had his nieces been his own children, the disposition and arrangements would probably have been the same as far as they affect them. If Sir John Barrington had died between the 28th of March and the 2nd of June 1817, Miss Julia Barrington's fortune would have been 10,000*l.*; but that 10,000*l.* would have been so settled by the will, as to have precluded the necessity of any other settlement of that sum. But, although the object was so attained, and the chances of life guarded against by this will, the negotiations proceeded with the intended husband. To this negotiation, the uncle was a party on the behalf of the intended wife, the father not interfering. On the 2nd of June, the settlement is executed, the father being no party to it, but the uncle is: and he put in settlement a sum of 10,000*l.*, charged on the reversion of the Swainston estate, (which was, by the will, to go in succession to the nieces,) for the advancement in life, and to provide for the maintenance of the niece, who was about to marry. Did not Sir John Barrington, by this settlement, exercise the office and duty of advancing the niece in life, and of providing for her maintenance, and that by a sum charged on an estate settled on her eldest sister and herself, in succession? Was not this a portion? And if so, was not the 10,000*l.*, appropriated to the same purpose, and ultimately charged upon the same property by the will, also

intended as a portion? But, if this was given as a portion, and is so to be considered, the giving it affords the strongest evidence, of the intention in the giver, to place himself for that purpose *in loco parentis*: and, on the other side, if the assumption be proved by other means, then the sum so given must be considered and treated as a portion. I consider both points as established by the evidence, and the proof of either is sufficient proof of the other, and so raises the presumption in equity that both gifts were not intended to take effect. Neither is this presumption rebutted by the evidence of the plaintiff; for independently of the presumption in equity against double portions, and of the positive testimony, that the testator, Sir John Barrington, intended his niece should have only one sum of 10,000*l.*, there is the strongest grounds for presuming, from the documents, that such must have been his intention. That such was his intention in 1813, is quite clear; that he continued to entertain the same intention up to and at the time of making his will, of 1817, is also quite clear; and he not only does not give her any more, but disposes of all the property, appropriating 10,000*l.*, and no more, to her. What ground is there for supposing that he had altered this intention on the 20th of April, after making his will? No stipulation for that purpose appears on the part of the intended husband: 10,000*l.* was the whole which he stipulated for, or which he had any reason to expect. Had Sir John Barrington, at the time he executed the settlement, an intention that his niece should have another 10,000*l.* under his will, would he not have made such additional sum the subject of negotiation, instead of leaving it as it stands in the will, which gives to the intended husband an unrestricted power over that sum? But, upon what ground is the direct evidence of Sir John Barrington's intention with respect to these two sums to be contested? The whole question is one of intention, and, on such an issue, the declarations of the party are, I conceive, admissible; and so the case is put.

It has been said, that the trusts of the 10,000*l.* by the settlement, differ from those prescribed by the will; and that the will

charges the Hatfield Broad Oak tithes, and other property, with the payment; whereas, by the settlement, the reversion of the Swainston estate alone is charged. After the decision of the House of Lords in the case of *Wharton v. Lord Durham*(3), the variation in the trusts cannot be relied on. That case having been argued before I had the honour of a seat in the House of Lords, I abstained from taking any part in the judgment; and I was glad to be enabled to do so, because I had been counsel in the cause; but I fully concur in that judgment.

As to the observation that the 10,000*l.* was by the settlement, only charged on the reversion of the Swainston estate, and might therefore have failed altogether, or have been postponed for a long period, it is to be observed, that although the charge on the reversion was by possibility in law liable to fail, by Sir John Barrington or his brother leaving issue male, who should attain twenty-one, and bar the reversion, yet the 10,000*l.* portion would not, in that event, have failed, it being in that case charged on the Post Office annuity(4); so that the charge, either by itself only, or by means of becoming a charge on the Post Office annuity, did, in fact, secure the 10,000*l.* But, what was the probability, in fact, of the charge on the reversion being defeated? I am not aware, that the age of the parties was distinctly in evidence; but Fitzwilliam Barrington had been married twenty-eight years, and had no son; and Sir John Barrington, who was the best judge of the probability of his marrying and having issue, evidently considered that event as one not at all to be taken into account: so that the reversion of the Swainston estate, though in law contingent, was, in fact, equal in value to an absolute interest, and must have so been considered by the party. The omission, therefore, of

(3) See 6 Law J. Rep. (N.S.) Chanc. 15. The decision in that case was reversed by the House of Lords, subsequently to the Vice Chancellor's judgment in *Powys v. Mansfield*.

(4) There appears to be some inaccuracy in this view of the case, as the Post Office annuity was brought into settlement, not by the Barrington family, but by the family of Mr. Powys.

the other property in the settlement, is necessarily a departure in effect from the intention declared by the will, of making the other property primarily liable for 50,000*l.*; for if such property was not thought equal to raise the whole 50,000*l.*, it was not material that 10,000*l.*, part of it, should be raised out of the reversion—[His Lordship referred to some of the evidence, which it is not material to set out.]

It has been argued, that the codicil of the 23rd of June 1818, confirmed the will, and makes the will speak as of the date of the codicil, and, therefore, revives the legacy, if it had been adeemed by the settlement, and is, at all events, evidence of the intention that the legacy should take effect. It is very true, that a codicil republishing a will, makes a will speak as of its own date, for the purpose of passing after-purchased estates, but not for the purpose of reviving a legacy revoked, adeemed, or satisfied. The codicil can only act on the will, as it existed at the time, and at that time the legacy revoked, adeemed, or satisfied, formed no part of it. Any other rule would make a codicil merely republishing a will, operate as a new bequest, and so revoke any codicil by which a legacy given by a former will was revoked, and undo every act by which it might have been adeemed or satisfied.

The cases are consistent with this rule, such as *Drinkwater v. Faulkner* (5), *Monck v. Monck* (6), *Booker v. Allen* (7); and the case of *Roome v. Roome* (8) is not an authority against the decision, because the codicil was not considered in that case as reviving an adeemed legacy, it having been decided there was no ademption: but the codicil was referred to as an additional proof that no ademption was intended. As to the argument, that the codicil must, at any rate, be evidence of an intention that both sums should be paid, the same answer may be given as has been given to similar arguments in other cases—namely, that the testator, if he knew the rule of law, must have known that the codicil could

not revive an adeemed legacy, and, therefore, that it was unnecessary to mention it. The probability, however, is, that his attention being directed to the only object of the codicil, the words of confirmation of his will were introduced as words of course, without any reference to the legacy in question.

I have not said anything as to the identity of purpose in the two gifts—namely making a provision for the niece in contemplation of her marriage; but, there are strong observations of Lord Eldon on that subject, in the case of *Trimmer v. Bayne* (9). Indeed, the facts of that case, in almost every particular, strongly resemble the present. It was the case of a natural child, the father of which must be, for every purpose, considered as a stranger. Verbal declarations were received in evidence of the father's intention; and the provision by the will, though not settling the property on the parties, and the issue of the marriage as in this case, had reference to the children's marriage: on which Lord Eldon observed, if there had been no general rule as to the ademption of the legacy by the settlement, it would be well worthy of discussion, whether it ought not to prevail in that particular case, the legacy being given with express and peculiar reference to the marriage of the daughter. Unless, therefore, it be admitted as a positive rule, that no one can, for these purposes place himself *in loco parentis* to a child who is living with his father, this case of *Trimmer v. Bayne* cannot be distinguished from the present. There is, then, the case which I before mentioned, of *Monck v. Monck*, which bears a strong resemblance to the present in many points. In that case, a testator had, by will, given 5,000*l.* to his brother, and, contemplating his marriage, directed in that event, it should be applied as a provision for his family. He afterwards advanced 1,000*l.* to his brother, and on his brother's marriage, settled 1,000*l.* on him and his family. Lord Manners held, that he had placed himself *in loco parentis*, and that the legacy was adeemed by the settlement, though, in that case, the evidence to shew the assumption of the office of parent, was

(5) 2 Ves. 625.

(6) 1 Ball & Bent. 298.

(7) 2 Russ. & M. 270; s. c. 9 Law J. Rep. Chanc. 130.

(8) 3 Atk. 181.

(9) 7 Ves. 508.

only to be found in the instruments themselves. In that case, it was also decided, that parole evidence was admissible in such cases to shew the intention; and a codicil, ratifying and confirming the will, did not set up an adeemed legacy. Lord Manners also ruled an identity of purpose as to the provision, though that was not so strong as in the present case. *Booker v. Allen* also embraces many of the points in question in this case; and, except that the legatee had no father, it was a case much less strong than the present against the double portions. Sir John Leach, then Master of the Rolls, held, that the testator had placed himself in *loco parentis*, and the presumption was, therefore, raised against the double portions; and, that evidence of the testator's intention was admissible; and that the codicil did not set up an adeemed legacy. Upon these authorities, and for these reasons, I am of opinion, that the evidence adduced to prove that Sir John Barrington had placed himself in *loco parentis* to his niece for the purpose of providing for her, is admissible for that purpose, and establishes that point, although the legatee was living with her father. The presumption against double portions, therefore, arises, and it is not repelled by the evidence adduced by the plaintiff. On the contrary, the result of the whole of the evidence is strongly to shew that Sir John Barrington intended his niece should only have one sum of 10,000*l.*, and that the legacy given by the will, therefore, should not take effect. I am also of opinion, that the legacy so adeemed by the settlement, was not set up by the codicil. The result, therefore, is, that the plaintiff has failed, in my opinion, in so much of the suit as sought payment of the 10,000*l.* legacy; and so much of the decree as provided for the payment of that legacy, must be reversed without costs; and so much of the bill as prayed payment of the legacy, must be dismissed with costs.

Decree accordingly.

V.C. { ATTORNEY GENERAL V. THE
Dec. 14. { LONDON AND SOUTHAMPTON
RAILWAY COMPANY.

Railway Act—Construction. 29th Dec. 1837.

By an act by which a railway company was incorporated, the usual power was given to them, to construct "according to the provisions and restrictions of the act," the said railway upon, across, or over any roads, &c., doing as little damage as might be. By a subsequent section it was enacted, "that where the railway should cross any turnpike road, or other public highway, by means of an arch," such arch should be "of such width as to leave a clear and open space under such arch of not less than fifteen feet":—Held, that, under these clauses, the company were empowered to diminish the width of any turnpike road, which was crossed by the railway, provided they left an open space of fifteen feet; and an application by the trustees of a turnpike road for an injunction to restrain a railway company from constructing a bridge over the road of less than the usual width of that road, on the ground, that an inconvenience to the public would be thereby occasioned, was refused; but leave was given to the trustees to proceed against the company in a court of law.

This information was filed at the relation of the trustees of the upper district of the Kingston and Skeetbridge turnpike road.

By the 5 Will. 4. c. 88, a company was incorporated for making a railway from London to Southampton. By the 9th section of that act, it was enacted, "that it should be lawful for the company to enter upon lands, and take levels, &c.; and also for the purposes and according to the provisions and restrictions of the act, to construct or make in, upon, across, under or over the said railway or other works, and in, upon, across, under or over any lands, streets, hills, valleys, roads, rivers, &c., such inclined planes, tunnels, embankments, bridges, arches, piers, roads, ways, passages, conduits, drains, culverts, cuttings and fences, and also to erect and construct such houses, wharfs, &c., as the said company should think proper; and also to di-

vert or alter the course of any rivers, &c., and also to divert or alter the course of any roads or ways, or to raise or sink any roads or ways, in order the more conveniently to carry the same over or under the said railway; the company doing as little damage as might be, in the execution of the powers thereby given them."

By the 72nd section, it was enacted, "that where the railway should cross any turnpike road, the road should be raised or sunk by the company, so that it should pass over the railway, or that the railway should pass over the roads by means of a bridge, of such height and width and with such an ascent or descent as was provided by the act."

By the 74th section, it was enacted, "that where any bridge should be erected by the company for the purpose of carrying the railway over or across any turnpike road or other public highway, the span of the arch of such bridge should be formed, and should at all times be and be continued of such width as to leave a clear and open space under every such arch of *not less* than fifteen feet, and of a height from the surface of such turnpike road to the centre of such arch of not less than sixteen feet."

By the 77th section, it was enacted, "that in all cases, in which, in the exercise of any of the powers thereby granted, any part of the carriage or horse roads, either public or private, should be found necessary to be cut through, diverted, raised, sunk, taken, or so much injured as to be impassable for passengers or carriages, or the persons entitled to the use thereof, the company should, at their own expense, before any such road should be so cut through, diverted, raised, sunk, taken, or injured as aforesaid, cause a sufficient carriage or horse road (as the case might require,) to be set out and made instead thereof, as convenient for passengers and carriages as the road to be cut through, diverted, raised, sunk, taken, or injured as aforesaid, or as near thereto as might be, and should cause the same to be put into good and substantial order and condition, where the former road could not more easily be restored; and when the road cut through, diverted, raised, sunk, taken, or injured, should be a turnpike road, the

substituted road, if temporary, should be set out and made as aforesaid, and the principal road should be restored within six calendar months after the commencement of the operation; and the railway, where it should cross such turnpike road, should be constructed and kept in repair in such manner as to prevent, as far as practicable, any obstruction to the passage along such turnpike road."

The line of the railway was to pass over Ditton Marsh, where it crossed the turnpike road from Kingston to Skeetbridge. The road, at the part where the railway was to cross it, was forty feet wide; but the company proposed to carry the railway over it by means of a bridge of the width of twenty-four feet only, of which five feet were to form a footpath. And as the railway crossed the road in a very oblique direction, the width of the road would be diminished to the length of 160 feet. The company had commenced the construction of an arch of the width above mentioned. The trustees of the road, considering that the arch would not be of sufficient width for the purposes of the great traffic upon that road, caused the present information to be filed. It prayed that the arch intended to be erected by the company might be declared a nuisance, and that it ought to be abated; and that the company might be restrained from proceeding with the proposed arch, or from erecting any other arch upon or across the said road, so as to obstruct or narrow it, to the nuisance and injury of the public.

There were several clauses in the act, as the 18th and four following clauses, by which the company were required to construct arches of a greater width than fifteen feet at the particular places mentioned in those clauses respectively, as over the rivers Wey and Itchen, the Basingstoke Canal, &c.

A motion was now made for an injunction to restrain the company from proceeding with their proposed bridge over the Kingston road.

In support of the motion several affidavits had been sworn by surveyors and others, who deposed that, in their opinion, the proposed arch would occasion great inconvenience and obstruction to persons

passing along the road: and on behalf of the company counter-affidavits were read, to shew that the dimensions of the proposed arch would be quite sufficient; and it was also deposed, that Putney Bridge, which was in the line of the Portsmouth road, was only twenty-two feet ten inches wide (except at occasional recesses), and 792 feet long, and that about Fulham, the road was in many parts not wider than from eighteen to twenty-four feet.

Mr. Knight Bruce, Mr. Foster, and Mr. Sugden, in support of the motion, contended, that the 74th section of the act required the company to make their arch not less than fifteen feet wide, not only over turnpike roads, but also over highways, which were frequently of less width than fifteen feet; but that this section did not relieve the company from the necessity of making their arches over turnpike roads and other great thoroughfares *more* than fifteen feet wide, where the convenience of the public required it: that the 9th section, which empowered them to cross a turnpike road, did not authorize them to obstruct that road by any of their brick-work, but merely to build an arch over it; that the general Turnpike Road Act required roads to be of the width of thirty feet; and that if the road were wider than necessary, the owners of the land on each side were entitled to the land which was not necessary for the road; and that the company had no right to appropriate it without making compensation; and that, at all events, the question was sufficiently doubtful to induce the Court to interfere—*Blakemore v. the Glamorganshire Canal Company* (1).

Mr. Wigram and Mr. Duckworth, contra, contended, that under the 74th section the company were empowered to cross any turnpike road in their line, provided they left a clear open space of the width of fifteen feet; that where an arch of that width was not considered sufficient, the legislature introduced special clauses to meet each such particular case, as the 18th and following sections; that the Court would not interfere merely because one

party might raise some doubt on the construction of the act; and if the question of nuisance were brought before the Court, the fact must be first tried by a jury—*The Attorney General v. Cleaver* (2).

Mr. Knight Bruce, in reply, contended, that it was clear, from the 77th section, that the legislature did not mean that the state of the turnpike roads should be altered by the company, more than was absolutely necessary.

THE VICE CHANCELLOR.—In this case it is observable, that by the 9th section it is enacted—[His Honour read that section], and if the act had stopped there, the company would have had a general power given to them, not merely to make (as I understand it) a bridge across a road, but to build piers and arches in and upon the road. And by the 74th section, the general power, which is given by the 9th section, is, on the face of it, intended to be restrained to a certain extent; because the parties are only enabled to do those things which the enabling clause gives them the power to do, according to the restrictions and provisions of the act; and when you look at the 74th section you find—[His Honour read that section]. Now, I should have thought *prima facie* that the company would have had their general power which was given under the 9th section, capable of being exercised as they thought proper, provided, in the crossing of any turnpike road, with a bridge, they did not so construct the bridge as to make the open space less than fifteen feet. That appears to me to be the plain and clear meaning of the language, and they may (as I understand it) actually erect the piers, which shall support the bridge, upon the road, provided that, when the bridge be constructed (I mean, in case of piers) there shall be a clear open space of not less than fifteen feet. But, then, it is said, that cannot be the construction, because, in the 77th section, there are some general words—[His Honour read that section]. That section points to two things, to the case which may arise, where it may be necessary, for the

(1) 1 Myl. & K. 181; a. c. 2 Law J. Rep. (N.S.) Chanc. 95.

NEW SERIES, VII.—CHANC.

(2) 18 Ves. 217.

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purpose of making some works, for temporary purposes, to divert the existing turnpike road, or where it may be necessary not merely to divert the turnpike road for a time, but absolutely, and altogether, for an indefinite time : and then it is provided, that the railway, when it crosses the turnpike road, shall be constructed and kept in repair—[His Honour read the section]. That is a provision which proves to me plainly, on the face of the section, not to be a general provision applying to all other sections, but applying to a particular case, contemplated by this section—namely, a case when there is a diversion of the road for a particular purpose, either temporary, or to continue for ever. But, it is in relation to the case which is contemplated by the 74th section, and is only a modification of the general power given by the 9th section. And, it appears to me, that it is useless to consider here, whether the construction of an act of the legislature may, or may not, produce inconvenience, or even damage of a worse kind than inconvenience : because, the law of the land determines what shall be the convenience both of the public and of individuals. I, therefore, sitting here as a Judge, have no power to determine on that point.

It appears to me, it is beyond a doubt on this act of parliament, that provided the open space left under the bridge upon the road is of not less than fifteen feet, the company may erect piers to construct the bridge on the road itself, and make the bridge as they please. There is, therefore, no foundation for this application, and I think it right not to grant an injunction.

If the relators, or those who conduct the suit, wish to take the opinion of a court of law, and establish their right to have the interference of this Court, I certainly will give them leave so to do ; but, at present, I shall not grant the motion ; and, if those who conduct the suit in the name of the Attorney General, think it right to take the opinion of a court of law, I must, of necessity, reserve the further consideration of this motion, that is, the question of costs, till we know what is the result of any such proceeding. It is but due to the Attorney General, whose name is fixed to this in-

formation, that the opinion of a court of law should be taken, if he desires it.

M.R. }
Dec. 22. } SMETHURST V. LONGWORTH.

Statute 1 Will. 4. c. 47. s. 11—Construction—Mortgage—Infant.

The 1 Will. 4. c. 47. s. 11. does not authorize the Court to direct a mortgage of an infant's estate for payment of the ancestor's debts.*

In this case, there was a deficiency of the personal estate for the payment of the debts of the deceased, and an order had been made, to raise the money out of the real estates which had descended on an infant heir. The Master, to whom the matter had been referred, reported that it would be for the benefit of the infant that the money should be raised by mortgage, but doubted whether a valid mortgage could be executed under the above act.

Mr. Pemberton, for the petitioner.

The MASTER OF THE ROLLS thought the act did not authorize a mortgage, observing, that the words "sale or mortgage," would naturally have occurred if a mortgage had been intended ; and he referred it back to the Master to see what portion of the estate ought to be sold.

* Which enacts, "That where any suit [hath been or shall be instituted in any court of equity, for the payment of any debts of any person or persons deceased, to which their heir or heirs, devisees or devisees, may be subject or liable, and such court of equity shall decree the estates liable to such debts, or any of them, to be sold for satisfaction of such debt or debts, and by reason of the infancy of any such heir or heirs, devisees or devisees, an immediate conveyance thereof cannot, as the law at present stands, be compelled, in every such case such Court shall direct, and, if necessary, compel such infant or infants to convey such estates so to be sold (by all proper assurances in the law) to the purchaser or purchasers thereof, and in such manner as the said Court shall think proper and direct ; and every such infant shall make such conveyance accordingly ; and every such conveyance shall be as valid and effectual to all intents and purposes as if such person or persons, being an infant or infants, was or were at the time of executing the same of the full age of twenty-one years."

L.C. }
Nov. 18. } TASKER v. SMALL.

Agreement—Specific Performance—Pleading—Parties.

*By articles, executed in contemplation of the marriage of A, who was tenant in tail of certain estates in remainder, expectant on the death of B, A. covenanted to settle the estate, (subject to B's life estate, and to the raising of a sum of 15,000*l.* for A's benefit,) to the use of C. and his heirs during the life of the wife, in trust for her, with remainders over, as therein expressed. A contract having been entered into by A, and certain incumbrancers claiming under him for the sale of his reversionary interest in the whole of the estates, to raise 15,000*l.*, the purchaser filed a bill for the specific performance of the contract, against A. and the other parties to the contract, and against A's wife, and a mortgagee in whom the legal estate was vested:—Held, reversing the judgment of the Court below, that neither the wife nor the mortgagee, (they not being parties to the contract,) was a proper party to the suit; and the wife having appealed from the decision of the Court below, the bill was dismissed as against her.*

This cause came before the Vice Chancellor on demurrer, on the 15th of July 1834; and also came on to be heard before him on the 3rd and 4th of June 1836. The judgment which his Honour pronounced on the hearing, will be found reported in 5 *Law J. Rep.* (n.s.) *Chanc.* 321. Mrs. Small appealed from his Honour's judgment, and the cause was again argued before the Lord Chancellor.

The facts of the case are fully stated in his Lordship's judgment.

Mr. Jacob and Mr. Willcock, Mr. Treslove, Mr. Coote, Mr. Cooper, Mr. Spence, Mr. K. Parker, and Mr. Girdlestone, appeared for different parties.

Mr. Phillips, the mortgagee, by his answer, had offered to execute a re-conveyance of the mortgaged property, upon being paid what was due to him on his mortgage; and did not, by his answer, raise the objection, that he ought not to have been made a party to the suit. It was therefore contended, that he ought not now to be allowed to insist on that

objection; and that if he was a proper party, and was to execute a conveyance of the estate, that then Mrs. Small, being interested in that estate, ought also to be before the Court.

The Lord Chancellor reserved judgment, which was pronounced on the 18th of November.

THE LORD CHANCELLOR.—The bill in this case is by a purchaser for the specific performance of a contract made and signed by himself, and by the defendants Baker Mann, and Small: and there is this peculiarity in the prayer, that it prays, "that it may be declared a good title can be made to the estate in question, free from incumbrances; and that the contract may be ordered to be specifically performed," &c.; and this seems to be the real object of the suit. In order to obtain a decision on this subject, there are made defendants certain mortgagees who are not parties to the contract, and Mrs. Small, the wife of the party to the contract; and she is the party appealing from the decree.

The facts of the case, as stated in the bill, are shortly these. Mr. Small, previously to his marriage, was entitled to an estate in tail male, subject to the life estate of Martha Lucas; and by his marriage articles, dated the 3rd of December 1830, his intended wife, the present defendant, being then an infant, he contracted with Mr. Ashford, her uncle, that the estate should, subject to the life estate of Mrs. Lucas, and the raising, by mortgage or otherwise, of any sum or sums of money not exceeding in the whole 15,000*l.*, by and for himself, be conveyed and assured, and for that purpose he covenanted that he would, as soon as conveniently might be after the marriage, (subject and without prejudice to the raising by any ways or means, and at any time or times he should think proper, of any sum or sums of money not exceeding in the whole 15,000*l.*, by mortgage, annuity or otherwise, for his own use and benefit, and to any deed or deeds and assurances which he might thereafter make and execute for securing the repayment of such sum or sums of money, and the interest thereof,) make and execute all the necessary and proper acts

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and deeds for the purpose of settling the estates to the use of Ashford during the life of the wife, in trust to pay the rents to her for her separate use, with remainder to himself for life, with remainder to the children, with remainder to the survivor of the husband and wife; with various powers for the management and application of the rents for the benefit of the children, all applicable to real estate; and a provision, that there should be inserted in the settlement all such powers, provisoes, covenants, clauses, and agreements, as might be considered essential for the parties interested therein, or which might be proper for effecting the several purposes therein mentioned, and as are usually contained in settlements of the like kind.

By deeds of the 2nd and 3rd of March 1831, Mr. Small having borrowed 5,000*l.* of Mr. Phillips, conveyed the estate to Mr. Phillips, subject to Mrs. Lucas's life interest, and to the usual provisoes for redemption, and covenanted to levy a fine for that purpose. Phillips had a power of sale given to him by this deed, and it contained a settlement of a policy of assurance for the life of Mrs. Lucas, for 5,000*l.* A fine was accordingly levied in Easter term, 1831. By deeds of the 26th and 27th of October 1832, Small having borrowed another sum of 5,000*l.* from the defendant Wakeford, secured the repayment of it in a similar manner; but, for this loan, the defendants Baker and Mann joined as security in the covenant for repayment, Small raised two other sums, one of 2,500*l.*, by mortgage of the estate to one T. Hawkins; and the other of 1,000*l.*, by sale of an annuity now vested in the defendant Sarah Baker. So, that of the 15,000*l.*, 1,500*l.* only remained to be raised. By indentures of the 28th and 29th of October 1832, to which Small, Ashford, Phillips, and Wakeford, and two mortgagees, and Baker and Mann were parties, Small conveyed the freehold to Baker and Mann, subject to the life estate of Mrs. Lucas, and the mortgages to Phillips and Wakeford, to sell the estate at their discretion, and to apply the proceeds in reimbursing themselves, repaying the premium paid, paying the mortgage debt to Phillips and Wakeford, and to pay the surplus to Small or the persons entitled under the deed of December 1830, namely, the

marriage articles. The defendants Baker and Mann are the vendors under this deed; and they, by an agreement dated the 21st of December 1833, to which they were parties, of the first part, Small of the second part, and the plaintiff of the third part, agreed, in consideration of 19,250*l.*, to sell the fee simple of the estate expectant on the death of Mrs. Lucas, so far as such estate had been acquired under the fine or otherwise.

It appears, that by deeds executed in 1831, in pursuance of the statute, (Mrs. Lucas having consented,) the effect of a recovery was obtained, and the legal estate vested in Phillips, then the mortgagee. There is no allegation in the bill respecting Small's interest, except the statement of the marriage articles.

To this bill Ashford and Mrs. Small put in a general demurrer, upon the discussion of which, at the hearing, two questions were raised: first, whether the marriage articles authorized Small to sell the estate to raise the 15,000*l.*, and if so, whether, under the circumstances, such power was duly exercised; and, secondly, whether Mrs. Small was a proper party to the suit. From the report of this case, in 6 *Sim.* 631, it appears that the counsel for Mrs. Small, being desirous of obtaining a decision on the other points, waived the objection of Mrs. Small being a party to the suit, and the Vice Chancellor overruled the demurrer; but his Honour expressed some doubt, whether Mrs. Small ought to have been made a party to the suit. On the hearing, both points were again raised, and his Honour made a decree, declaring that Small was entitled to sell the fee simple in remainder, of the whole estate, for the purpose of raising the 15,000*l.*; and he referred it to the Master to inquire, whether that sum, or any part thereof, had been raised, and whether the contract of the 21st of December 1833 was at the time a fit and proper contract. The decree, therefore, adjudicated nothing, as to the propriety of the contract, and cannot therefore be objected to, if the declaration be correct, that, under the articles, Small was entitled to sell the fee simple in remainder of the whole estate for the purpose of raising the 15,000*l.*; the question, as to the manner

in which the power had been exercised, being reserved. But I understand the declaration declared that such power existed from the moment of the execution of the articles.

The second question is to be considered first; because, if Mrs. Small be not a proper party to the suit, it will not only be unnecessary, but improper, to give any opinion as to other points in the cause. It is not disputed, that generally, in a bill for a specific performance of a contract for sale, the parties to the contract only are the proper parties; and when the ground of the jurisdiction of a court of equity in such cases comes to be considered, it could not properly be otherwise. The Court assumes jurisdiction in such cases, because the remedy in a court of law, giving damages only for the non-performance of the contract, will not, in many cases, afford an adequate remedy. But in equity, as well as in law, the contract constitutes the right, and regulates the liability of the party; and the object of both proceedings is to place the parties complaining in the same situation as nearly as possible, as the defendant had agreed that they should be in. It is obvious that persons who are strangers to the contract, and therefore neither entitled to the rights, nor subject to the liabilities arising out of it, are as much strangers to the proceedings in this court, to enforce the execution of the contract, as they are to a proceeding in a court of law, to recover damages for a breach of it.

But it is said this case ought to be an exception to the rule, because Mr. Phillips, in whom, as first mortgagee, the legal estate is vested, is not willing to convey the property to the purchaser without having a competent authority for so doing; and that the question being raised, whether the legal estate can be so conveyed, Mrs. Small is of necessity made a party to the suit.

Now this proposition assumes two points; first, that Phillips himself was a proper party to the suit, and secondly, that being so, it was competent for him to require that Mrs. Small should also be made a party. Phillips is merely a mortgagee, against whom no bill can properly be filed, except for the purpose of redeeming his mortgage,

and that by a party entitled to redeem. This bill does not pray any redemption against Phillips's mortgage; and if it had, the plaintiff would not be entitled to file such a bill. He is only connected with the property as having contracted to purchase the equity of redemption, which purchase is still incomplete; and till the purchase is complete he cannot redeem the mortgage. Phillips has no interest in the specific performance of the contract; he is no party to it; and the performance of it cannot affect or interfere with his security.

But supposing, secondly, that it was competent for him to redeem Phillips's mortgage, he can only be so entitled as standing in the place of the mortgagor. But a mortgagee can never refuse to restore to his mortgagor or those who claim under him, on repayment of what is due in respect of the mortgage, the estate which became vested in him as mortgagee. To him it is immaterial on repayment of the money, whether the mortgagor's title is good or bad: he is not at liberty to dispute it any more than a tenant is at liberty to dispute his landlord's title. Mr. Phillips is therefore bound on payment to restore the legal estate to his mortgagor, or those who claim under him. If the plaintiff could shew that the equity of redemption, which was reserved by Phillips's mortgage, had now become vested in him, he would be entitled, on payment of the mortgage debt, to claim a reconveyance of the legal estate without regard to any other question affecting the title of the property.

I am, therefore, of opinion, that Phillips himself was not a proper party to the suit, and he cannot, by waiving the objection himself, make it proper that Mrs. Small should be introduced as a party to the suit: and that, even if he was himself properly made a defendant, the objection raised by him at the bar, though not by the answer (for he offers to reconvey on being paid the mortgage debt), would not make Mrs. Small a proper party.

But it was argued at the bar, that the plaintiff was in equity invested with all the rights of Mr. Small, on the principle, that, being a contract to purchase, the purchaser would become the equitable owner of the property. This rule applies to both par-

ties to a contract, but cannot be extended to affect the interest of others. If it could, a contract for the purchase of an equitable estate, would be equivalent to an assignment of it, and those who had an interest in the estate would have to contest the question with the plaintiff, whether the contract was such as to constitute the plaintiff the owner of the estate before the contract is carried into effect, as a purchaser cannot enforce equities attaching on the property.

In *Mole v. Smith* (1), Lord Eldon says, "When a bill is filed for a specific performance, it should not be mixed up with a prayer for relief against other persons claiming an interest in the estate." Such was Lord Eldon's opinion in a case in which a vendor was the plaintiff, and the defendants were persons whom he sought to compel to join in completing the title. How much stronger is the objection, when the purchaser is the plaintiff, and the only connexion between him and the defendant is incomplete.

I am, therefore, of opinion, that Mrs. Small was not a proper party to this suit; and she has a right to raise the objection; and the objection being raised, the bill ought to have been dismissed as against her. It is to be regretted that this opinion prevents the parties from having the question between them decided, as it might otherwise have been; but I cannot, to avoid an inconvenience in a particular case, sanction a proceeding which I consider to be inconsistent with the rules of pleading, and which, if recognized, would introduce much difficulty and confusion into the proceedings of the Court.

V.C.
March 1.
L.C.
June 26;
July 4;
Nov. 25.

MIREHOUSE V. SCAIFE.

Will—Construction—Charge of Debts and Legacies on Real Estate—Marshalling Assets—Statute 3 & 4 Will. 4. c. 104.

A testator, after making bequests of several pecuniary legacies, and of a specific chattel,

(1) Jacob, 494.

and after giving one field, directed his debts and all the above legacies to be paid within six months from his death, and gave the residue of his estate, both real and personal, to M. N. The testator's personal estate being insufficient to pay his debts and legacies, two of the pecuniary legatees filed a bill, in order to have their legacies declared a charge on the residuary real estate, or otherwise to have the assets marshalled:—

Held, upon demurrer, reversing the opinion of the Court below, on both points—first, that the pecuniary legatees were not entitled as against the residuary devisee, to have the assets marshalled;—and secondly, that the debts and legacies were charged by the will on the residuary real estate.

The construction put by the Court upon a charge of legacies on real estate, is not affected by the 3 & 4 Will. 4. c. 104.

A testator, by his will, dated the 21st of October 1833, after giving a few pecuniary legacies, continued as follows:—"Also I give unto Robert Scaife, all my interest in the brig *Solon*; unto Hannah Lewthwaite, my servant woman, 10*l.*; unto James Brockbank, my godson, I give and bequeath one field, known by the name of Gillfoot, as a memorandum, to be by him enjoyed at my decease. It is my will, that all my debts, and all the above legacies be paid and discharged within six months after my decease. And all the *rest and residue* of my estate, both real and personal, lands, messuages, and tenements, I give unto Mary Newton, the wife of George Newton, of Green, by her freely to be possessed at my decease."

The testator died in February 1836; and his personal estate, proving insufficient for the payment of his debts and legacies, a bill was filed by two of his pecuniary legatees against the executors, and Mr. and Mrs. Newton, and the heir-at-law of the testator. The bill prayed, that it might be declared that the debts and legacies of the testator were charged on his residuary real estate, devised to Mary Newton; or if not, then that the assets might be marshalled, and that a sufficient sum for the payment of the legacies might be raised by sale or mortgage of the estates devised to Mary Newton. The bill did not seek to charge the estate spe-

cifically devised to Brockbank, who was not made a party to the suit.

To this bill, Mr. and Mrs. Newton put in a general demurrer, for want of equity.

Mr. Knight, Mr. Jacob, and Mr. Booth, in support of the demurrer.—Every devise of real estate is specific, whether the land devised is particularly described, or whether it is comprised in a devise of residuary real estate. And as a specific devisee is as much an object of the testator's bounty as a legatee, general pecuniary legatees have no equity to have assets marshalled, as against a devisee, whether he takes under a specific or residuary devise.

Forrester v. Lord Leigh, Amb. 173.

Scott v. Scott, *ibid.* 383; s. c. 1 Eden, 459.

Hill v. Cock, 1 Ves. & Bea. 175.

Keeling v. Brown, 5 Ves. 359.

Nannock v. Horton, 7 Ves. 399.

Milnes v. Slater, 8 Ves. 305.

There is nothing which shews an intention on the part of this testator to charge any part of his real estate with the payment of his legacies. The direction that the legacies should be paid within six months, only affects the time of payment, and not the fund out of which payment was to be made: and that direction applies to the legacy of the brig, as much as to any of the other legacies; and, as that legacy could not be charged on the land, why should it be held that the others are so charged?—*Douce v. Lady Torrington* (1).

Mr. Wigram and Mr. Walker, in support of the bill.—The distinction between a specific and a residuary devise, is established by several cases—

Hanby v. Roberts, Amb. 127; s. c. 1 Dick. 104.

Spong v. Spong, 1 You. & Jer. 300; s. c. 3 Bli. n.s. 84.

And from the language of the judgment in *Shallcross v. Finden* (2), and *Ponell v. Robins* (3), it is clear that Lord Alvanley and Sir William Grant had that distinction in their mind in those cases.

Clifton v. Burt, 1 P. Wms. 679.

Wythe v. Henniker, 2 Myl. & K. 635; s. c. 3 Law J. Rep. (n.s.) Chanc. 24.

(1) 2 Myl. & K. 600.

(2) 3 Ves. 739.

(3) 7 Ves. 211.

But the plaintiffs insist, that by the will the legacies are charged on the real estate:

Ambrey v. Middleton, 4 Vin. Abr. 460.

Bench v. Biles, 4 Mad. 187.

Clifford v. Lewis, 6 Mad. 33.

Cole v. Turner, 4 Russ. 376; s. c. 6

Law J. Rep. Chanc. 101.

Withers v. Kennedy, 2 Myl. & K. 607;

s. c. 3 Law J. Rep. (n.s.) Chanc. 29.

Since the passing of the statute 3 & 4 Will. 4. c. 104, the testator's real estates are, by law, subject to the payment of his debts if his personal estate is not sufficient; and, as he must be presumed to have used these words, in order to do something more than could have been done without them, the will must be held to have rendered his real estates liable to the payment of his legacies.

March 1.—The VICE CHANCELLOR—[after stating the case].—The first point is, whether the words of the will, as I have stated them, are sufficient to charge the residuary real estate. It seems to me impossible, that they can be held to charge the real estates generally, or the field specifically devised; and I also think, that they do not constitute a charge on the real estate contained in the residuary devise. In a great number of cases, the Courts have shewn themselves exceedingly anxious to lay hold of any words which would prevent a testator's debts from being unpaid; and a laboured anxiety and technical finesse have been exercised to give to some words found in a will, an effect far beyond their natural import. But it appears to me impossible to construe this will merely by adverting to former cases, because the law had received a material alteration before the testator made this will, namely, by the passing of the act 3 & 4 Will. 4. c. 104. The general object of that act was to make a person's real estates, of whatever character, liable to the payment of his debts; and it is observable that the act has made copyhold and customary estates liable to the payment of debts, precisely in the same way as, under former statutes, the freehold estates of traders were made assets to pay debts; a preference being given to specialty debts. The effect, therefore, is a legislative enactment, that where there has been no charge of debts by the

will, the real estates shall not be *equitable* assets.

But if it is said, attention is to be paid to old rules which existed before the statute, on the other hand it may be said, that everybody is supposed to know the law; and, if I were to hold that these words would constitute a charge of debts on the residuary devised estates, I should be saying that the testator, with the knowledge of the law that all his real estates would, under the provisions of the act, be liable to pay debts in a manner in which specialty debts are preferred, has charged his real residuary estates to make them equitable assets, while the estates which were the subject of the specific devise would be still treated as legal assets. It would be a mode of construction perfectly whimsical, being, in fact, doing something which it is quite unnecessary to do; because the law is, of itself, sufficient to provide for the payment of debts. Since the passing of this act, unless words are perfectly clear, it will be unnecessary to hold the construction which the Courts have sometimes adopted, in order that debts might not remain unsatisfied. But really it appears to me, that what the testator had in contemplation, in this particular case, was not to charge his real estates with his debts, but to provide for their speedy payment. That object is expressed in terms; and it was remarked at the bar, that, at all events, with regard to the brig, which was the subject of one of the legacies, it would be absurd to hold that the words constituted a charge of the legacies on the real estates.

The next question is, whether the assets shall be marshalled. Now it appears to me, that this point has been expressly decided, though not much noticed; but it is impossible to read *Hanby v. Roberts*, reported in *Ambler* and *Dickens*, without observing that Lord Hardwicke took it to be a clear point that a devise of "rest and residue" was not a specific devise. [His Honour stated the case of *Hanby v. Roberts*, and also referred to *Powell v. Robins*, *Aldrich v. Cooper* (4), and *Spong v. Spong*.] I admit, that in *Keeling v. Brown* (5) there is an express declaration, that in such a

case as the present the assets cannot be marshalled. But it does not appear that in that case Lord Alvanley's attention was called to Lord Hardwicke's decision in *Hanby v. Roberts*, which is express and clear. And if I find a precedent in the House of Lords, in *Spong v. Spong*, a judgment which states the point otherwise, with the concurrence of Lord Eldon, Lord Manners, and Lord Redesdale, I must take it to be the opinion of the House of Lords, notwithstanding Lord Alvanley's opinion, that the law is, that in such a case as the present, the assets shall be marshalled. It appears to me, that the language of Sir William Grant, in *Powell v. Robins*, shews that to have been his opinion.

My opinion is, that in this case the plaintiffs do not succeed in shewing that the real estates were charged with the payment of the legacies; but that they are entitled to have all the benefit of the real estates which the law of marshalling can give; the demurrer must therefore be overruled.

The defendants appealed from this decision; and the cause was argued before the Lord Chancellor on the 26th of June and 4th of July.

Mr. Jacob and *Mr. Booth* appeared for the defendants; and

Mr. Wigram and *Mr. Walker* for the plaintiffs.

Nov. 25.—THE LORD CHANCELLOR.—This was an appeal from an order of the Vice Chancellor overruling a demurrer. The question is, therefore, whether the bill states such a case as entitles the plaintiffs to any relief against the parties who are defendants. The plaintiffs are legatees of pecuniary legacies. The defendant, who demurs, is the devisee of the residue of the testator's real estate.—[His Lordship stated the will.]—The plaintiffs contend, first, that by this will the residuary devise of the testator's freehold estate, that is, the whole of the real estate except Gillfoot, is charged with the payment of his legacies; and secondly, that they and the other legatees are entitled to have the assets marshalled, so as to throw the debts on the real estate, and leave sufficient personal estate to discharge those legacies. The

(4) 8 Ves. 382.

(5) 5 Ves. 359.

Vice Chancellor was against the plaintiffs on the first point, and in their favour as to the second; and therefore overruled the demurrer. I concur in opinion with the Vice Chancellor, that the demurrer cannot be maintained; but as the principle may be of importance in other cases, I think it right to state some observations on both grounds, that my judgment may not be misunderstood.

The first proposition contended for by the plaintiffs is, that the rule that pecuniary legatees are not entitled to have the assets marshalled as against a devisee, is confined to *specific* devises, and does not extend to land taken under a *residuary* devise. I will advert, first, to the second proposition, and consider first the authorities, and then the reasons for the rule.

In support of the right of marshalling, *Hanby v. Roberts* was cited.—[His Lordship stated the case.]—That case was decided upon a different rule as to the marshalling of assets; which rule was also allowed in *Masters v. Masters* (6), *Bligh v. the Earl of Darnley* (7), and recognized by Lord Eldon in *Bonner v. Bonner* (8).

The passage relied on in the first of these cases is this: "If one having land and personal estate makes his will, being indebted by specialty, and he gives specific legacies, and then gives the rest and residue of his real and personal estate, if creditors exhaust the personalty, the legatees may stand in their place, and come upon the residuary devisee, because he has only the rest and residue." As this case is stated, it is not properly a case of marshalling. The specialty creditor was entitled to payment out of both funds; he having payment out of the fund not primarily liable, the owner of the fund out of which payment was so made, had to be reimbursed out of the fund which was primarily liable. This only means that, as between a specific legatee of personalty and a residuary devisee of land, the land is primarily applicable to the payment of specialty debts; which doctrine was laid down in *Long v. Short* (9). Lord Hardwicke first puts the case as between ge-

neral pecuniary legatees and the heir; then as between general pecuniary legatees and a devisee, without making any distinction between a specific and a residuary devisee; then as between general pecuniary legatees and specific legatees of personalty; and then as between a specific legatee and a residuary devisee. On this construction only can this passage be made consistent with the decision in *Forrester v. Lord Leigh*, decided in the year 1753, that is, two years after *Hanby v. Roberts*. In that case, the devise was of all the testator's real estate in several counties, which were mentioned, or elsewhere in England. He gave several pecuniary legacies, and the legatees sought to throw the specialty debts on those estates; and it was urged, that the devise was not specific. Lord Hardwicke said that every devise of land was specific; and his reason was, that land did not fluctuate, because no more passed by the will than the testator had at the time of making his will; and he therefore refused the relief.

There are some expressions used by Sir William Grant, in *Powell v. Robins*, which are supposed to support this claim; but on minutely examining that case, it will be found to have no relation to it. The case there was between simple contract creditors and a devisee, specialty creditors having exhausted the personalty; and there was no question about the marshalling. The question was, whether the testator had by his will charged his real estate with the simple contract debts. Sir William Grant decided, that the words used did not of themselves make a charge on the real estate, supposing it not to pass to the executors, referring to cases which had been decided on that ground. It is, I think, obvious that the expressions relied on are to be referred to the first question, and that Sir W. Grant meant to distinguish the case before him from the cases referred to; and that his language had no reference to marshalling assets against a residuary devisee in favour of pecuniary legatees.

Scott v. Scott is a distinct authority against marshalling assets. The devise there was of all the testator's real estate not before devised. The specialty creditors had exhausted the personalty, and the legatees claimed a right to marshal. Lord

(6) 1 P. Wms. 421.

(7) 2 P. Wms. 619.

(8) 13 Ves. 379.

(9) 1 P. Wms. 403.

Henley held, that the legatees were not entitled to have the assets marshalled. It does not appear, from the report of *Herne v. Meyrick* (10), whether the devise there was specific or residuary; but though the distinction is taken between lands descended and lands devised, there is no distinction made between a devise of specific lands and lands devised under a general residuary clause. In *Clifton v. Burt*, the devise appears to have been specific; but Lord Macclesfield says, "Every devise of land is as a specific legacy, and shall not be broken in upon, or made to contribute towards a pecuniary legacy."

The case of *Keeling v. Brown* is directly in point against the claim of marshalling, and is in every respect similar to the present. There was no charge of legacies on the land, and there were lands which were specifically devised, and other lands which passed under a residuary clause. The legatees claimed to marshal the assets, not against the land specifically devised, but against those which were comprised in the residuary clause. But there was another point, whether the legacies were charged upon the land: Lord Alvanley decided that they were not; and then referring to the point of marshalling says, "I cannot marshal the assets for payment of the legacies. I have formerly fully expressed my opinion upon this point, as to the difference between debts and legacies. I understand the Lord Chancellor expressed some doubt about it in the case of *Williams v. Chitty* (11), but upon reflection, I still remain of the same opinion." This passage has been supposed to support the point of marshalling; the error is probably in the report; but, I think, it clearly refers to the point, whether the will charged the legacies upon the land, as neither of those cases related to the question of marshalling. It is well known, that Lord Alvanley and Lord Rosslyn differed in opinion, as to what expressions would charge legacies on land. The case of *Aldrich v. Cooper* was between creditors only, and a devise of copyhold, and does not bear on this point.

It has been supposed, that this question was set at rest by the case of *Spong v.*

Spong, which, however, does not very closely apply to the present case, as there was no question there about marshalling, but merely a question between devisees, whether one part of the estate was not primarily liable; the whole estate being subjected by the will to the payment of the legacies. The testator devised some particular lands to one person, and bequeathed certain legacies, and then charged all his real and personal estate with the payment of those legacies. He then gave the residue of his real and personal estate to his son, whom he appointed executor. It was held by the Court of Exchequer, that all the lands, whether specifically devised or taken under the residuary clause, were equally liable to the payment of the legacies, on the ground that all devises of freehold land were equally specific. In the House of Lords this was otherwise decided, and the decision certainly proceeded on a distinction between lands specifically devised, and lands devised by a general residuary clause, as to which were in that case primarily liable. But it is precisely the case put by Lord Hardwicke, in *Hanby v. Roberts*, except that his Lordship supposed a case between a residuary devisee and a specific legatee; while *Spong v. Spong* was between a residuary devisee and a specific devisee. In both, the question was as to priority of liability; but in neither was there any question about marshalling. Lord Manners is made to say (12), "By the general rule, a specific devisee or specific legatee shall not contribute to make good a pecuniary legacy; but there can be no such rule applicable to a residue." It does not appear how this observation could apply to the case before the house, and it does not appear, that it had any reference to the question of marshalling. At most it was only a dictum.

Such, as I understand them, is the state of the authorities. It remains to be considered, whether there is reason for the proposition, that, in the sense in which the term must be understood for the present purpose, every devise of land is to be considered specific. The case put by Lord Hardwicke, in *Hanby v. Roberts*, and the decision of the House of Lords in *Spong*

(10) 1 P. Wms. 201.

(11) 3 Ves. 551.

(12) 5 Bli. 106.

v. *Spong*, do not decide, that a devise of land as a residue is not specific; but only that in those cases the lands comprised in the residuary devise, were, according to the language of the will, subject to certain charges, in priority to the other property specifically given. If the distinction between specific and residuary devisees is to be maintained, and the same terms are to be held to constitute a residuary devise of land as make a residuary gift of personalty, the right to marshal by legatees will arise in very numerous cases, as in the case of a devise of "all the testator's real estate"—"all his land in A, or elsewhere." It cannot be necessary that the words "rest and residue" should be used in one case more than in another. When a testator gives the residue of his personal estate, he knows it will be uncertain, till his death, what will be included in that gift; but he knows that it will operate only in part of what he may have at his death, all his debts, funeral expenses, and other charges, being to be paid; and this expression necessarily imports what will remain after all these charges shall be paid. But the testator does know precisely on what real estate his will will operate, unless there be charges on the land beyond what the personal estate will satisfy. If the term "residue" were used by the testator, with reference to what would remain after deducting Gillfoot, the meaning and construction would be the same as if he had first enumerated all his lands, and then had devised Gillfoot, and had afterwards devised all the rest of his enumerated lands. Beyond all doubt, it would be as specific a devise of the rest, as of Gillfoot. This would, indeed, have been the case with personalty. On this supposition, the land comprised in the residuary clause was a specific devise; and if so, it is admitted, that no case of marshalling can arise. The terms "rest and residue of my real estate, lands, messuages, and tenements," must mean what the testator had at the time of making his will, deducting Gillfoot, or some other matter or thing which would diminish the value of his lands: but the only matters or things referred to in the will, by which their value could be diminished, were the debts and legacies which he had before directed to be paid. But if the words "rest and resi-

due" were used in that sense, they would, in many cases, amount to a charge of debts and legacies on the land; and as the plaintiffs would then be entitled to be paid out of real estate, when the personalty was exhausted, the question of marshalling would be excluded.

But this view of the case leads to another consideration—namely, whether the terms of the will do not charge the debts and legacies on the land. The testator gives several pecuniary legacies, and one specific legacy, and one field, whether of inheritance or not does not appear, except that he uses no words of inheritance; and then he says, "it is my will that all my debts and all the above legacies be paid and discharged within six months after my decease; and all the rest and residue of my estate, both real and personal, lands, messuages, and tenements, I give unto Mary Newton, by her freely to be possessed at my decease." There is a direction, that all his debts and legacies shall be paid, and then a devise of his real estate. This has, in many cases, from *Stanger v. Tryon* (13) down to *Clifford v. Lewis*, been held sufficient to charge the lands. But there is also a devise of the rest and residue of the real estate, after a direction to pay debts and legacies, as in *Hassel v. Hassel* (14), and in the cases put by Lord Hardwicke, in *Brudenell v. Boughton* (15). There is also a blending of the real and personal estate, and a gift of the residue of both, as in *Hassel v. Hassel*, *Bench v. Biles*, and *Cole v. Turner*, circumstances which relieve this case from the question discussed between Lord Alvanley and Lord Rosslyn, in *Chitty v. Williams* and *Keeling v. Brown*, as to whether words admitted to be sufficient to charge lands with debts, ought to be held sufficient to charge them with legacies. If, indeed, this charge were to be confined to debts, a new ground of marshalling would be opened. To attribute different meanings to the same sentence, may sometimes be necessary, but nothing but necessity can justify it. When a testator speaks of the rest and residue "of his personal estate," he clearly means what will remain after payment of his debts and legacies: and must it not be sup-

(13) 3 Vern. 709; Raithby's note.

(14) 2 Dick. 527.

(15) 2 Atk. 268.

posed, that he would use the same expression, with the same meaning, with reference to real estate?

I do not feel justified in departing from the rules laid down in cases prior to the late statute, 3 & 4 Will. 4. c. 104, on account of the beneficial provisions of that act. To do so, would create much confusion, uncertainty, and litigation, and the provisions of that act can have no bearing upon the construction of a charge of legacies.

This will directs the time for the payment of debts and legacies; and it was contended, that the direction had no other object but to fix the time: but from the gift which follows, of the rest and residue of the real and personal estate, it may be inferred, that the testator had a further object in view. If I were to allow the demurrer, I should be deciding, that under this will, Mary Newton was to enjoy all the testator's freehold estates, except Gillfoot, leaving all the legacies unpaid. This I am not prepared to do. I agree with the Vice Chancellor, in thinking that the demurrer must be overruled; but not concurring in all the observations made by him, I thought it right to state so far the view I entertain, upon the principles and authorities which have been brought under my consideration.

The appeal must be dismissed, but without costs.

V.C.	}	MARQUIS OF BREADALBANE v. MARQUIS OF CHANDOS.
Nov. 16, 17, 25,		
1836.		
L.C.		
Dec. 7, 8, 11,		
1836.		
July 22, 1837.		

Settlement — Articles — Construction — Legitim — Jurisdiction.

Previously to the marriage of the son of an Englishman with the daughter of a Scotchman, proposals for a settlement were agreed upon between the fathers of the intended husband and wife, which proposals, after providing for all the purposes usual in settlements of that description, stipulated that the settlement should contain all "usual and necessary clauses." A settlement was after-

wards executed in the English form, all the parties being then in England; and related to estates of the husband's family in England, Ireland, and Jamaica, and to the money portion of the wife. No clause was introduced relating to any claim which the intended wife might have, under the law of Scotland, to any part of her father's property. The wife having become entitled, by the law of Scotland, on the death of her father, to a share of his personal estate, by way of legitim, the Court (discharging an order of the Court below) refused an injunction to prevent the payment of the wife's legitim, which injunction was applied for on the ground, that under the stipulation for the insertion in the settlement of "usual and necessary clauses," a clause to bar legitim ought to have been introduced.

Legitim can only be barred by express renunciation; and the father of the wife, in negotiating for a settlement on his daughter, could not be regarded as treating, adversely to her, for a renunciation of her rights.

The Court will not interfere to reform a settlement founded upon prior articles, except it is clearly shewn that the settlement did not carry the intention of the parties into effect. The construction which the settlement has put upon ambiguous words found in the articles, is conclusive.

When a case has been adjudicated on by another Court of competent jurisdiction, whether this Court will interfere in the same case, on the ground of a discovery of new matter, or of the plaintiff having been prevented by accident or any other reason from bringing his claim before the other Court—quære.

By the settlement executed on the marriage of the Marquis and Marchioness of Chandos, dated the 11th of May 1819, and made between the Duke of Buckingham, the father of the Marquis, of the first part; the Marquis of the second part; the late Marquis of Breadalbane, the father of Lady Chandos, of the third part; Lady Chandos, then Lady Mary Campbell, of the fourth part; and different trustees, of whom the present Marquis of Breadalbane was one, of the fifth, sixth, and seventh parts; after reciting, among other things, that upon the treaty for the marriage, it was agreed that Lord Breadalbane should pay or secure

30,000*l.*, as the portion or fortune of Lady Mary, of which sum, 10,000*l.* was to be paid on or before the marriage, the further sum of 10,000*l.* within eighteen months after the marriage, with interest at 5*l.* per cent. in the meantime, and the remaining 10,000*l.* within six months after the death of Lord Breadalbane, with interest from the day of his decease; and also reciting, that it was further agreed that the Duke of Buckingham should receive the first two sums of 10,000*l.* and 10,000*l.*, and in consideration thereof, should covenant for the payment of 20,000*l.*, within two years after the marriage, with interest in the meantime; and that such sum of 20,000*l.*, and the interest thereof, should be further secured in the manner thereafter expressed; and that it was agreed that the 20,000*l.* so to be covenanted to be paid by the Duke of Buckingham, and the 10,000*l.*, part of the 30,000*l.*, which was to be paid on the decease of Lord Breadalbane, and the several securities for the same, should be vested in the trustees therein named, upon the trusts thereafter declared; and that, in further consideration of the intended marriage, and also of the portion or fortune of Lady Mary Campbell, the Duke of Buckingham and the Marquis of Chandos had proposed and agreed to settle and assure certain estates in the counties of Buckingham, Oxford, Warwick, and *Northampton*, in England, in several counties in Ireland, and in Jamaica, to the uses, upon the trusts, &c. thereafter expressed—the estates comprised in the settlement were limited to trustees for different terms of years, for securing to Lord Chandos an annuity of 5,000*l.* per annum, during the joint lives of himself and his father, and also for securing a jointure and pin-money, for Lady Chandos, and for raising portions for the younger children: and subject to those terms, the estates were settled on the Duke and Lord Chandos successively for life, with remainder to the sons of the marriage successively in tail male, with remainders over; and the provision made for Lady Chandos was declared to be in bar of dower.

Lord Breadalbane executed two bonds of equal date with the settlement, to secure the two sums of 10,000*l.*, which were to be paid within eighteen months after the mar-

riage, and upon his Lordship's decease; and the former of those sums, and also the 10,000*l.* which was to be paid to the Duke on the marriage, were duly paid by the Marquis of Breadalbane.

Lord Breadalbane, the father, died in March 1834, leaving three children, the present Marquis, Lady Chandos, and Lady Elizabeth Pringle. It was insisted that one-third part of his personal estate was divisible, according to the law of Scotland, among his children, as legitim or bairn's part. Lady Eliz. Pringle had expressly released her claim to legitim, by her marriage settlement; and as Lord Breadalbane, the son, was not entitled to legitim, unless he collated or brought into hotchpot the entailed estates descended to him from his father, which he refused to do, Lord and Lady Chandos claimed the whole of the legitim fund, amounting to about 125,000*l.*, the whole personal estate of Lord Breadalbane being nearly 400,000*l.* Under these circumstances, a suit of multipoleinding, resembling a suit of interpleader, was instituted in the Court of Session in Scotland, by the trustees of the late Lord Breadalbane's property, in which suit, an interlocutor was pronounced in January 1836, by which the claim of Lord Chandos was allowed; and this decision was afterwards confirmed by the House of Lords (1).

After the proceedings had been instituted in the Court of Session, and while the cause there was waiting for judgment, certain papers were discovered which had been drawn up preparatory to the marriage settlement. It appeared that the arrangements for the settlement had been left to the Duke of Buckingham on the one side, and Lord Breadalbane, the father, on the other; and had been conducted by Lord Lauderdale on behalf of Lord Breadalbane, and on behalf of the Duke by Mr. Thomas Grenville, his uncle. A paper, called, "A sketch of the proposed settlement," was drawn up and signed by Lord Lauderdale and Mr. Grenville, and approved by all the parties, by which it was agreed, that Lord Breadalbane should give his daughter 30,000*l.* at the times which were afterwards mentioned in the settlement;

(1) 14 Shaw & Dunlop, 309; 15 Shaw & D. 48; and 2 Shaw & Maclean, 377.

that the Duke should provide a sum of 20,000*l.* within two years after the marriage, and should charge his estates with 20,000*l.* for younger children; and there was then an agreement that the Duke should settle estates in England, (not, however, mentioning any estates in Northamptonshire, but specifying some estates in Hants,) Ireland, and the West Indies, to the amount of 44,000*l.* a year. Several queries were afterwards stated on this paper, but no allusion was made to legitim, or to any claim which Lady Chandos might be supposed to have in her father's personal property.

This sketch was delivered to Mr. Vizard, the English solicitor of Lord Breadalbane, who forwarded it to an eminent conveyancer in London, to draw out from it proposals for a settlement in a more formal manner. By the proposals which were drawn out accordingly, Lord Breadalbane was to pay the Duke 10,000*l.* on the marriage, 10,000*l.* within eighteen months after it; and he was also to give a bond for the payment of 10,000*l.* to trustees, within six months after his death. Certain terms of years were then stated, which it was proposed should be created in the Duke's estates, to provide an annuity for Lord Chandos, and a jointure, &c. for Lady Chandos, and to raise portions for the younger children. The estates referred to in the proposals were stated to be in the counties of Bucks, Oxon, Warwick, and *Hants*, in Ireland, and the West Indies, and to be of the yearly value of about 44,000*l.*, and these estates were to be settled, subject to the terms of years, in the manner which was adopted in the settlement.

The proposals ended with the following clause: "*The settlement to contain the usual powers of appointing new trustees—the usual clauses of indemnity to trustees, and all other usual and necessary clauses.*" These proposals were sent, by Lord Breadalbane's solicitor, to the solicitor of the Duke, (who also resided in London,) and the settlement was afterwards prepared from them by the same conveyancer who had drawn up the proposals.

In the most important points, the settlement agreed with these proposals, but it varied from them in a great number of instances, in points of less consequence.

On the discovery of these documents, which were not brought before the Court of Session, the Marquis of Breadalbane filed the present bill, insisting that a clause to bar legitim was a *usual clause* in Scotch settlements; and that, therefore, the agreement in the proposals, for the insertion of *all usual and necessary clauses*, rendered such a clause proper to be introduced in the settlement in question. It charged, that Lord Breadalbane intended the provision should be in bar of legitim; and stated that Lord Breadalbane had executed three several instruments, in 1794, 1798, and 1812, to make provision for his younger children, and had declared in each of those instruments, that the provision thereby made was to be taken instead of legitim; and that in 1824, his Lordship, by virtue of the statute 5 Geo. 4. c. 87, charged his Scotch estates with the payment of the 10,000*l.* which he had covenanted in the settlement should be paid within six months after his death; and that he then declared that the provision made for Lady Chandos, was in lieu of legitim. The bill prayed, that it might be declared that Lady Chandos's claim to legitim was barred by the settlement, and by the contract between the parties; or, otherwise, that the settlement might be reformed by the insertion therein of a release of claim to legitim by Lord and Lady Chandos; and, that they might be restrained by injunction from taking advantage of the judgment of the Court of Session.

Lord and Lady Chandos, by their answer, denied that they ever intended, and they did not believe that any of the other parties to the settlement intended, that Lady Chandos was to release her claim to legitim.

It appeared that, at the time of the marriage, Lord Breadalbane, the father, was a domiciled Scotchman; but the treaty for the settlement was carried on in London. All the parties were then in London, and none but English agents were employed or consulted on either side.

Lady Elizabeth Pringle, the other daughter of the Marquis of Breadalbane, intermarried with Sir John Pringle in October 1831; and, on that occasion, a settlement was executed in the Scotch form. Lady

Elizabeth received from her father 20,000*l.*, and renounced all right to legitim.

It also appeared, that, in Scotch settlements, a clause is usually inserted, to the effect that the children of the intended marriage should not be entitled to legitim; but that, on the marriage of Lord Breadalbane, the father, no settlement was made, and consequently the claim of his children to legitim had not been thus defeated.

On the coming in of the answers, the plaintiff moved for an injunction to restrain Lord and Lady Chandos from receiving any of the fund to which the Court of Session had declared them entitled, and to restrain the trustees from paying it to them.

Mr. Knight, Mr. Jacob, and Mr. G. Richards, appeared in support of the motion; and—

Mr. Burge, Mr. Wigram, and Mr. Stuart, opposed it.

The Solicitor General and Mr. T. J. Phillips, appeared for the trustees.

The VICE CHANCELLOR having granted the motion, the Marquis and Marchioness of Chandos appealed from that decision, and moved before the Lord Chancellor, that the injunction granted by his Honour might be dissolved.

Mr. Tinney, Mr. Pemberton, Mr. Burge, Mr. Wigram, and Mr. Stuart, for the motion, insisted, that where the Court interfered to rectify settlements, the fact that the settlement was founded on some previous articles, ought to appear on the face of the settlement itself; but that, in this case, there was nothing but extrinsic evidence to connect the settlement with the sketch or the proposals; that, in this case, the estates in the settlement were different from the estates in the proposals; that the circumstances under which sums were to be raised for Lady Chandos and the younger children—that the powers which were given, and the terms of years,—were all different in the two instruments; that the right of a child to legitim could only be barred by express renunciation, as had been decided in this case by the House of Lords.

Erskine's Institutes, p. 707.

Lashley v. Hogg, Robertson on Personal Succession, 126.

Russell on Conveyancing, 2nd edit. 66.
Bell's Principles of the Laws of Scotland, 432.

That none of the parties in this case (at all events with the exception of Lord Breadalbane,) were aware, at the time, of the claim of Lady Chandos; that the proviso for the insertion of usual and necessary clauses was introduced by an English lawyer, and meant only such clauses as were necessary to give effect to the provisions which the proposals had already embodied, and that as the settlement had been drawn by the same gentleman who framed the proposals, he had clearly shewn what meaning he attached to his own expression; that the Court of Session was fully competent to determine the rights of these parties, being a court of equity as well as of law; that the fund was, in law, in the possession of that court, which had adjudicated upon the matters in dispute, and that this Court would not open the decree, except a case of fraud or collusion were made out; and that the plaintiff, who sought to have the settlement rectified, was no party to that deed except as a trustee.

Wharton v. May, 5 Ves. 71.

Kennedy v. Lord Cassillis, 2 Swans. 313.

Bushby v. Munday, 5 Mad. 227.

Lord Portarlington v. Soulby, 3 Myl. & K. 104.

Redesdale Tr. on Pl. 4th edit. 83, 89, 90, 92, 93.

Ogilvie v. Herne, 13 Ves. 563.

De la Vega v. Vianna, 1 B. & Ad. 284;
s. c. 8 Law J. Rep. K.B. 388.

Farquharson v. Seton, 5 Russ. 46.

They also contended, that by the terms of the Act of Union with Scotland, this Court had no jurisdiction which enabled it to question the decision of the Court of Session, affirmed, as it had been, by the House of Lords.

Mr. Knight, Mr. Jacob, and Mr. G. Richards, contra, contended, that when a father made a provision for a child on marriage, it was generally the meaning of the parties that the child so advanced, should not have any further claim on the parent's estate: that the covenant by Lord Breadalbane, for the payment of 10,000*l.* within six months after his death, indicated an intention that his daughter should have

no other interest in his property: that a clause to bar legitim was one of the commonest clauses in Scotch settlements.

System of Styles, by Dallas of St. Martin, p. 730, 733, 737.

Bell's Forms of Deeds, edit. 1804, p. 319, 332, 334.

Juridical Styles, 2nd edit., vol. 1, p. 164, 167, 180, 293, 294, 295; vol. 2, p. 204, 216.

Russell on Conveyancing, 2nd edit. p. 326.

That in cases where a clause had been omitted out of a settlement by mistake, the Court would reform the settlement and insert the clause.

The Duke of Bedford v. the Marquis of Abercorn, 1 Myl. & Cr. 312; s. c. 5 Law J. Rep. (n.s.) Chanc. 230.

Beaumont v. Bramley, Turn. & Russ. 41.

The Marquis Townshend v. Stangroom, 6 Ves. 328.

That Lord Lauderdale, who acted for Lord Breadalbane, was a very able Scotch lawyer, and knew that children had, by the law of Scotland, a claim to legitim, and also, that a clause to bar legitim was generally inserted in settlements; and therefore assumed that such a clause would be introduced as a usual clause.

Mr. Tinney, in reply, insisted that the precedents which had been brought forward, shewed that it was usual in Scotch settlements to insert a clause, that the children of the intended marriage should not have legitim, but not that the parties about to marry should give up their own claim; and that whether Lord Breadalbane did or did not intend that his daughter should release her claim, was immaterial, if none of the other parties had any such intention.

July 22, 1837.—THE LORD CHANCELLOR.—This was a motion to discharge an order of the Vice Chancellor, for an injunction to restrain Lord and Lady Chandos from taking advantage of a judgment of the Court of Session in Scotland. It was argued before me some considerable time back. The magnitude of the sum in question between the parties, and the order which had been pronounced by the Vice Chancellor, made me desirous to postpone my judgment till I should have time and

opportunity of going through the whole of the papers, and considering the various points which had been argued at the bar. I have now had an opportunity of doing that, and I hope the parties have not experienced any material inconvenience from the delay which has taken place.

The bill raises three propositions. It first prays the Court to declare that, by the construction of the settlement of 1819, the claim to legitim is barred. It then alleges, that if that should not be found to be so, it was a matter of contract and agreement between the parties at the time of the marriage settlement of Lord and Lady Chandos, in the year 1819, that the legitim should be barred. It then alleges that there was a paper, which was lately discovered, being the proposals which preceded the settlement, and that those proposals furnish evidence of the intention of the parties, or at least contain words amounting to a contract, that the settlement should contain a provision barring Lady Chandos's title to legitim; and on these three grounds, the construction of the settlement of 1819, the alleged contract between the parties, and the effect of words found in the proposals, though not introduced into the settlement, it prays that the Court will grant an injunction to restrain Lord and Lady Chandos from taking advantage of the judgment of the Court of Session, by which Lady Chandos has been decreed entitled to her legitim. The sum in question is of great magnitude, for it is one third part of the whole personal estate of the late Lord Breadalbane, which personal estate is said to amount to 400,000*l*.

Now, as to the first of the propositions raised by the bill, that is finally disposed of by the judgment of the House of Lords. The construction of the settlement of 1819 has been the subject of the judgment of the Court of Session, and that judgment of the Court of Session has been affirmed by the House of Lords, by which it has been decided that that settlement does not bar the title to legitim. The next proposition in the bill, namely, that it was a matter of contract between the parties that the legitim should be barred, that the settlement, therefore, did not carry into effect that which was agreed upon, is positively

denied by the answer; and this being a motion on the answer, for the present purpose it must be assumed, and indeed I have not the slightest doubt, looking at all the transactions between the parties, that there was no such contract between them. The only point therefore remaining is that which has been put forward as the principal equity in support of the claim of the plaintiff to this injunction, namely, that the proposals, which were not in evidence before the Court of Session, and which, it is alleged, have been since discovered, contain within themselves that which amounted to a contract, whether the parties had it in contemplation or not, that the legitim should be barred.

Now, the proposals were prepared in London by Mr. Vizard. It is stated, that they were approved of by the Duke of Buckingham, acting for his son Lord Chandos, and by Lord Breadalbane, acting for his daughter Lady Chandos. The proposals were—[His Lordship stated the substance of the proposals.]—Then the proposals contain these words: "The settlement to contain the usual clause of indemnity to trustees, and all other usual and necessary clauses."

It is contended, that inasmuch as it is usual in Scotland, when a father provides a portion for a child, that he should require the child to enter into a renunciation of the claim to legitim, these words in the proposals, whether the parties had it in contemplation or not, amount to a contract between the parties that the settlement should contain that which is alleged to be a usual provision in Scotch settlements. Now, the settlement itself was entirely of English manufacture: it was prepared by Mr. Vizard, and it, in fact, contains no such clause. But it recites that Lord Breadalbane was to pay and secure 30,000*l.* as the portion or fortune of Lady Chandos: that has been adjudicated not to amount to a renunciation of legitim, it being clearly proved that in the Scotch law legitim cannot be renounced by inference, but that it requires express contract and distinct renunciation for the purpose of depriving the child of legitim.

Lord Breadalbane afterwards executed two bonds, one to secure the 10,000*l.*, to be paid eighteen months after the mar-

riage, and the other to secure the 10,000*l.*, to be paid after his own death.

It appears that in 1831, the other daughter of Lord Breadalbane, now Lady Elizabeth Pringle, married; and in her marriage settlement there is an express renunciation of her title to legitim.

It appears, also, that in 1824 (Lord Chandos's marriage having taken place in 1819), Lord Breadalbane was desirous, under a power which an act of parliament (2) gave him, of charging the 10,000*l.* which he had contracted to pay, upon his estates; and in that bond he expresses it, that the 10,000*l.* so charged was to be in bar of Lady Chandos's title to legitim. Now, that can be material only as it may evidence the impression upon Lord Breadalbane's mind: it cannot affect the rights of the parties, which are to be determined, not by anything which Lord Breadalbane did after the marriage, but by that which took place between the parties at the time of the marriage.

It also appears that, anterior to the marriage, that is to say, in the years 1794, 1798, and 1812, Lord Breadalbane executed certain instruments, making provision for younger children; and in all those instruments it is declared, that the provision so secured, was to be in bar of the children's title to legitim. These of course are immaterial to the present purpose; they are important only as they may shew Lord Breadalbane's knowledge of what was necessary to bar a child's claim to legitim. The intention there expressed is not consistent with the marriage settlement, in which it appears that no such intention was expressed, and no such means taken to bar Lady Chandos's title to legitim. The Court of Session in Scotland is unquestionably a court of equity as well as a court of law; and, I apprehend, there can be no doubt that it was within the jurisdiction of the Court of Session to entertain the question which the plaintiff has thought proper to raise upon this record. The suit in Scotland was a suit of *multiplepoinding*: all parties having any claim were called before the Court for the purpose of asserting their title to the personal property of Lord Breadalbane. The ques-

(2) 5 Geo. 4. c. 87.

tion was raised in that suit as to whether the title of Lady Chandos to legitim was barred by the settlement; but no supposed title, arising from the terms of the proposals, was brought forward. It certainly is contrary to the practice of this Court to assume jurisdiction on equities arising from parties not having taken the opportunity of asserting their title in that court in which the matter has been the subject of adjudication, and in which they have either missed their opportunity or not thought proper to bring their title forward. But in the view I have taken of this case, it is not necessary to pursue that question further: I have adverted to it only that I may not be misunderstood;—that it may not be assumed that this Court would have jurisdiction to enforce an equity after adjudication by another court, where the matter of equity was cognisable, on the ground of the party not having thought proper, or, by accident, or any other reason, having taken no steps, to bring forward that claim before the Court. Such being the case made by the bill, the defendants' answer positively denies all contract or understanding on the subject. They say, that the whole negotiation was left to the Duke of Buckingham on the one side, and to Lord Breadalbane on the other. They admit that it is usual in Scotland to insert clauses barring legitim; but they state that which was established by the decision of the House of Lords in this very case, that though it is usual to insert a clause barring legitim, yet that legitim cannot be barred except by distinct contract. They also admit, that on Lady Elizabeth Pringle's marriage, her legitim was barred; but they allege it was barred by express contract introduced into and specified in the settlement.

Now, from what is stated in the answer, and from that which was decided in the Court of Session, and confirmed in the House of Lords, two points were clearly established: first, that the mere giving a portion is no bar to legitim, but that in order to bar legitim, it is necessary there should be express renunciation; and secondly, that the settlement in this case did not operate as a bar to Lady Chandos's right to legitim.

The sole question therefore is, whether

the provision in the proposals for the insertion of the usual and necessary clauses, gives a title to correct the settlement by the insertion of such a clause. The first question is, was that the intention of the parties? First of all, was it the intention of Lord or Lady Chandos, the party from whom this very valuable right was supposed to be taken by what took place in 1819? They, by their answer, positively deny, not only that there was any such intention, or that there was any such contract, but that the subject-matter was present to their minds at all. In short, they state that they knew nothing about legitim, and there is not any reason to suppose that the case is at all misrepresented by the answer. The next question is, was it the intention of the Duke of Buckingham to surrender the claim to legitim? It is equally clear that he thought nothing about it; it is probable he knew nothing about it; and there is an absence of all evidence that he had present to his mind the question of legitim, to which his son, in right of his wife, would become entitled, or that he intended to consent to the barring of any such right.

Then it is said, though that may be true, yet Lord Breadalbane, living in Scotland, and being acquainted more or less with the Scotch law, and having the assistance of a very experienced Scotch lawyer, Lord Lauderdale, whom he appears to have consulted on all the arrangements with regard to the settlement, must have known the law of Scotland with reference to the child's title to legitim, and that it was usual to insert clauses barring legitim in settlements which a father makes on his children; and that he therefore must have understood the words "usual and necessary clauses," as intending to provide that the settlement should contain a clause barring Lady Chandos's title to legitim.

Now, the first observation that arises upon that proposition is this, that Lord Breadalbane was afterwards a party to the settlement itself, which contains no such provision. It also appears that, subsequently, namely, in the year 1824, when he executed a deed of that date, he made an attempt, which was obviously not likely to have a very beneficial effect to himself; he charges the 10,000*l.*, which

was to be paid after his death, upon his Scotch estate, and he declares that it shall be in bar of legitim. Now, if he had supposed that legitim had been before barred by the settlement, it would have been a perfectly unnecessary provision in a deed which was to carry into effect the provisions of the settlement, to specify that it should be in bar of legitim. But supposing that he had any such intention—supposing that he, residing in Scotland, was more or less cognizant with the Scotch law, and that the right of his child to legitim, and the means by which that right would be barred, had been present in his mind, it is quite clear that he never communicated that to the other parties. The renunciation of legitim by his child, was that which enured to his own benefit; he was authorized to treat on behalf of his child, with respect to her rights, those which he had conferred upon her by the provision of 30,000*l*. He was authorized on the part of his daughter to treat with the father of the intended husband; but he had no authority, nor was it ever supposed that Lord Breadalbane was invested with any authority to treat, not as with the father of the husband, but as between himself and his daughter, on the subject of the claim to legitim in the daughter and her intended husband, they being entirely ignorant of any such question being raised, or of any such effect being given to the transactions then in progress. Now, if he put that construction upon these words, of which however there is not only no evidence, but I am perfectly satisfied that the subject-matter, strange as it may appear, was as absent from his mind, and from the mind of Lord Lauderdale, who was acting for him, as it was from the minds of Lord and Lady Chandos, or Mr. Vizard, who was acting for them, or the Duke of Buckingham, who was acting for Lord Chandos; but if that was present in his own mind, and not communicated to the other parties, or present in the minds of the other parties, it would be very difficult to contend, that the right of Lady Chandos to legitim, out of the personal estate, was to be barred. Now, if Lord Breadalbane had so understood the words in the proposals, it must have been because he was acquainted with the Scotch law, and knew that such cove-

nants were usual to be inserted in Scotch settlements; but it is most extraordinary that with that knowledge, and with the supposed construction put by him upon the words in the proposals, he afterwards executed a settlement which contained no such provision, although the proposition is this, that he, knowing the Scotch law, knew that an express renunciation of legitim was necessary, in order to carry the intention into effect. Upon the whole, it is positively denied that the parties sought to be affected by this injunction knew anything about the right of legitim. The result of the whole leaves no doubt upon my mind, that it was not present to the minds of any of the parties.

But still, though the parties had not the subject-matter present to their minds, they may have used words which may operate upon rights, of which they were not cognizant. If a party thinks proper to bar all rights that he has, it is not necessary to prove that he knew all his rights, or that he had ascertained what his rights were.

That brings the case to the question—the only arguable question—what is the effect of these words in the proposals? Now, it is always to be kept in mind, that, by the law of Scotland, nothing but an express renunciation will have the effect of barring the title to legitim; and it would be a strange conclusion, if the Court were to decide, that the effect of the words being introduced into the proposals, would be to deprive one of the parties contracting, of the title to property of the enormous amount of that in the present case, none of the parties to that arrangement having any intention that they should so operate, or that that should take place. Still, it is possible that the words may have that effect. Now, the proposals relate entirely to English subject-matters. They are between parties resident in England; the only party not resident in England being Lord Breadalbane. It was the marriage settlement of the son of an English nobleman marrying the daughter of a Scotch nobleman. It was prepared in England, the subject-matter is English, and all the parties English; and after providing for all the purposes usual in a settlement of that description, the provision for younger children, for the wife, and for the settle-

ment of the estate, the words of the proposals are, "the settlement to contain the usual clauses of indemnity to trustees, and all other usual and necessary clauses." Now, I apprehend, that taking those proposals according to their ordinary meaning, after parties have stated what they profess to do, and the provisions that they intend to make, when they provide, "that all usual and necessary clauses" shall be inserted, they must be taken to mean, all usual and necessary clauses for the purpose of carrying into effect the provisions before expressed, of which the right of legitim forms no part.

In *Anstruther v. Adair* (3), the question arose out of a settlement which was executed in Scotland, between parties domiciled in Scotland; and the question was with respect to the equity of the wife, according to the English law. It was most properly decided by Lord Brougham, that the settlement being executed in Scotland, between Scotch parties, it must be disposed of according to the law of Scotland, and that you cannot apply the equity of the English law between parties living in Scotland, and who never had in contemplation the equity of the English law. This is a settlement executed in England, between English parties, relating to English subject-matter, and providing for its objects by the usual clauses, with reference not to anything *dehors* the settlement; not to any right which might arise by the law of a foreign country, Scotland being for this purpose a foreign country, and different laws being administered there from those administered here. The obvious meaning of these words is, that there shall be such clauses as are usual and necessary for the purpose of carrying into effect the contract between the parties.

There were cited, not I believe in the argument here, but in the argument in the House of Lords, a variety of cases, with respect to that part of the law which comes the nearest to the law of legitim in Scotland—namely, the rights of parties to a share of their parent's estate, under the custom of London and York; and several cases were cited, where the title of the child was barred by the provision given by the

father to the child. But in no case was there any instance found of the orphanage part being barred, merely by the giving of the portion. There were cases where the father had advanced a portion to his child, and had stipulated that that should bar the orphanage part; but no case was produced where the title of the child was held to be barred by that which had taken place here—namely, by the father simply advancing the portion of the child, under terms such as those which are contained in this settlement.

The ground upon which this motion is rested, is, that there is evidence which would justify the Court in correcting the settlement. The proposals being afterwards matured into a settlement, it is the settlement which binds the rights of the parties, unless there is something bringing the case within the authority of other cases, in which the Court has felt itself authorized to correct a settlement, upon the ground of mistake or misapprehension, and to introduce into the settlement something which appears to have been the intention of the parties, as evidenced by other means than the settlement itself. Now, in order to justify the Court in doing that, it is obvious that there must be a clear intention proved. It must be shewn, that the settlement did not carry the intention of the parties into effect. If there be merely evidence of doubtful or ambiguous words having been used, the settlement itself is the construction which the parties have put upon those doubtful or ambiguous words; they have themselves, therefore, removed any doubt which might have existed upon that which forms the foundation of the settlement. But, in this case, although it is unnecessary I should pursue that subject further, there is an absence of proof, that the settlement did carry out those proposals. It differs from the proposals in some most important parts. No doubt, those were the proposals originally suggested; but what passed between the time of the proposals and the execution of the settlement—what gave rise to any change of intention—or why it was the settlement was not in conformity with the proposals in other matters, does not at all appear. But there is evidence of a manifest departure in important points in the

(3) 2 Myl. & K. 513.

settlement, from the arrangements contained in the proposals. In order to justify the Court in correcting the settlement, it must be proved, not only that the contract was different from that which the settlement carried into effect, but that there was no change of intention to explain how it happened, that the settlement did not follow the terms of the original contract.

Now, if Lord Breadalbane had this knowledge, which is the foundation of the whole argument—if, seeing these words in the proposals, he imagined the settlement would contain terms barring Lady Chandos's title to legitim out of his estate—he, of course, would have expected that the settlement should be framed so as to effect that purpose; and he who would take the benefit of that renunciation, would naturally look to see that that object of his had been carried into effect. He is a party to that settlement, not for the purpose of taking the benefit of Lady Chandos's renunciation, but inasmuch as he was a party contracting to make further provision for Lady Chandos, by paying 20,000*l.* at a future period. Is there anything, then, in that settlement, which could induce him to suppose that the intention which he had in his mind, of protecting his personal estate from Lady Chandos's claim to legitim, had been carried into effect?

In the course of the argument here, many books were referred to, for the purpose of shewing, that in Scotch settlements it is usual to insert clauses barring legitim; but that only proves that it is usual so to contract; for it is clear, that without special contract for that purpose, legitim cannot be barred. And the question is, not whether it is usual in Scotch, but whether it is usual in English settlements (in which no reference is made to legitim, or to any rights dependent upon the Scotch law,) to insert such a clause. It is sworn by the answer, by which I am on this motion bound, that Lord and Lady Chandos never intended to give up their claim to legitim; and I am satisfied from all the facts of the case, that the question never occurred to the minds of any of the parties. If it had, that claim might have been barred; but looking to the settlement, I am equally clear that it provided "all the usual and necessary clauses" which the parties intended.

And I must construe the proposals to mean, all clauses usual and necessary for the purpose of carrying into effect the arrangement before detailed, of which the renunciation of legitim formed no part; and I am also of opinion, that if this were doubtful, the settlement afterwards executed removes the doubt, and proves what the parties meant; and that there is not any such evidence to shew a mistake in the settlement, as to justify a court of equity in interfering to remedy that settlement. Upon these grounds, I am bound to dissolve the injunction which the Vice Chancellor has granted.

Injunction dissolved.

L. C.

Apr. 20; May 5; }
1836. } MILLIGAN v. MITCHELL.
Nov. 17, 1837. }

Trust—Practice—Pleading—Evidence—Dissenter's Chapel.

Where, at the hearing, a cause is ordered to stand over for want of parties, with liberty to amend, by adding parties, it is irregular to amend by adding new co-plaintiffs.

The lease of a chapel was held on trust for a particular form of worship. The chapel was afterwards, in breach of trust, used for a different form of worship:—Held, that two of the persons interested might sue on behalf of themselves and all others interested, for the due performance of the trusts on which the lease was held.

Evidence was taken in a cause, in which A. and B. were sole plaintiffs; when the cause came on to be heard, it was ordered to stand over for want of proper parties, and liberty was given to amend. The plaintiffs then amended their bill, by describing themselves as suing on behalf of themselves and all others interested:—Held, that the evidence taken before amendment, might be used in the suit after the record had been thus varied.

Books kept by the sessions clerk of a Scotch chapel, containing minutes of the kirk sessions, and other proceedings of the congregation,—Held, to be admissible in evidence in a suit between members of the congregation.

The question in this case was, whether a chapel at Woolwich, which was princi-

pally supported by pew rents, had been exclusively devoted to worship according to the institutions of the Church of Scotland. The principal facts will be found in 4 *Law J. Rep.* (n.s.) *Chanc.* 281.

At the hearing, an objection was taken, that all the other pew-holders, besides the plaintiffs, who were interested in the suit, had not been made parties. An order was then made, "that this cause do stand over, and that the plaintiffs be at liberty to amend their bill, for the purpose of adding parties, as they may be advised, or of shewing why they are unable to bring all proper parties before the Court" (1).

Under this order, the bill was amended, by adding four persons, who had been pew-holders, as plaintiffs to the suit. The six plaintiffs were stated to sue "on behalf of themselves and all other persons (except the defendants) who were entitled to be pew-holders or seat-holders in the church or chapel at Woolwich, comprised in, and demised by the indenture of lease of the 14th of July 1800, thereafter mentioned, and to call for the execution of the trusts of the said indenture, who should seek the benefit of this suit."

The bill was further amended, by introducing a statement that Milligan and Sharp, and the new plaintiffs, up to the re-election of Mr. Scott, notwithstanding he was disqualified, occupied sittings in the church, and had, up to that time, paid their pew rents; and that by the departure from the original form of worship, they had been deprived of the benefits of the trusts of the chapel, and had ceased to attend the church. And the bill contained some charges in evidence of the due payment by them of their pew rents.

The defendants being served with subpoenas, answered the amendments, and insisted that the amendments were improper, and that the absence of the other persons interested not being accounted for, the bill was still defective for want of parties.

No further witnesses were examined, and the cause came on for hearing.

Mr. Agar, *Mr. E. R. Daniel*, and *Mr. Chandless*, for the defendants, took a preliminary objection, contending, that the

manner in which the plaintiffs had amended the bill, and the proceedings thereon, were quite irregular, and contrary to the meaning of the order and the usual practice: that where a cause proceeded to a hearing, and then stood over to add parties, it was only permitted to add parties defendants. Instead of making the pew-owners parties, as the Court intended, the plaintiffs had added four persons, who stated, that they were not pew-owners. That the new statements contained in the bill, were improper, as the plaintiffs had thereby shaped their case in accordance with the evidence already taken, and had raised an issue not before the Court at the former hearing. That evidence being taken in a cause in which two persons only were plaintiffs, could not be used in a case where there were six plaintiffs. The amendments were made in the vacation, which prevented the defendants applying to the Court.

Mr. Wigram and *Mr. James Russell*, contra, contended, that the addition of plaintiffs under an order to amend, was regular—*Hitchens v. Congreve* (2). If the original plaintiffs had sued on behalf of themselves and all other persons interested, it would have been sufficient; it could not form any objection, that one or two of that class, on whose behalf they sued, should be introduced by name, as plaintiffs upon the record; that the situation of the defendants had been improved by the amendment, as they had a greater security for costs. They also urged, that the new matter introduced did not make a different case, but was merely explanatory of the plaintiffs' title. They cited—

The Attorney General v. Newcombe, 14 Ves. 1.

Magdalen College v. Sibthorpe, 1 Russ. 154.

Milligan v. Mitchell, 4 *Law J. Rep.* (n.s.) *Chanc.* 281.

April 20, 1836.—The LORD CHANCELLOR.—The amendments are most irregular. The order of the 21st of July 1835, is not quite in the ordinary form; and the explanation why it was not, appears from the latter part of it, which was, in consequence, introduced. It was alleged at the former

(2) 5 *Law J. Rep.* *Chanc.* 176; this was the common order to amend.

(1) *Reg. Lib. B.* 1835, p. 887.

hearing, that the number of persons interested was so great, that it would be impossible to make them all parties to the cause, and therefore the clause was introduced, giving the plaintiffs liberty to amend their bill, by adding parties, with liberty to state why they could not bring all proper parties before the Court. This was done, after depositions had been taken in a cause in which there were only two plaintiffs; and then the bill is amended by adding certain other plaintiffs, and containing no very short statements with reference to those new plaintiffs. Suppose when the cause first came to a hearing, the plaintiffs had made out no case, the bill would then have been dismissed; but could they under such an order as this alter the record, so as to make a case, under the pretence of bringing new parties before the Court—an order authorizing them to amend their bill not generally, but by adding parties, and shewing why all proper parties could not be brought before the Court? The amendments are perfectly irregular. No authority has been cited in support of them, and I could expect none. After such alterations, how could the witnesses be indicted for perjury, if they have sworn falsely? There is no such record as that in which the depositions were taken, for the plaintiffs have introduced new plaintiffs. It is clear the cause cannot proceed as it now stands. I think the right order will be, that the cause should stand over, with liberty to either party to make such application as they please.

May 5.—On a subsequent day, upon motion by the plaintiffs, to amend, by striking out the names of the additional plaintiffs and the new charges, and a cross motion by the defendants, that the original and amended bill might be dismissed with costs, or otherwise that the amended bill, and the answer thereto, and the replication, might be taken off the file, and all the subsequent proceedings set aside, with costs,—

The LORD CHANCELLOR ordered, that the amended bill should be taken off the file, and all subsequent proceedings set aside, the defendants having their costs thereof, and of the present motion, without

prejudice to the right of the plaintiffs to avail themselves of the liberty given them, by the order of the 21st of July 1835.

August 5.—The plaintiffs afterwards amended the bill, by describing themselves as suing “on behalf of themselves and all persons, except the defendants, who, at the time of the breach of trust hereinafter complained of, were holders, or now are or are entitled to be holders of seats or pews in the church or chapel, comprised in and demised by the indenture of lease of the 14th of July 1800, hereinafter mentioned, or to vote at the election of a minister of the said church or chapel.”

The following was the only new charge added to the original bill: “And your orators charge that the persons who are now occupiers of pews or seats in the said church are so numerous, that the suit could not be prosecuted if they were individually made parties thereto, and that the persons who were occupiers of seats or pews in the said church, when the before-mentioned breach of trust began to be committed, were so many in number that this suit could not be effectually prosecuted if they were made individually parties to the same; and in fact the said persons, exclusive of your orators and the defendants hereto, were upwards of 100 in number.”

Mr. E. R. Daniel, on behalf of the defendants, moved that the amended bill might be taken off the file, or that the amendments might be expunged. He cited—

Lloyd v. Loaring, 6 Ves. 773.

Good v. Blewitt, 13 Ves. 397.

The Attorney General v. Newcombe, 14 Ves. 1.

Leigh v. Thomas, 2 Ves. sen. 312.

Baldwin v. Lawrence, 2 Sim. & Stu. 18.

But the motion was refused, with costs.

The cause now came on for hearing before the Lord Chancellor, and it may be convenient again to state, that the first point in dispute was, whether the chapel had been devoted exclusively to worship according to the institutions and observances of the Church of Scotland, or generally to the Presbyterian form of worship.

It appeared, that about the year 1799 the chapel in question had been built by

voluntary subscription, and from the evidence (a portion of which will be found in the judgment of the Lord Chancellor), the Court concluded that it had been erected for the purpose of worship according to the forms of the Church or Kirk of Scotland.

In 1800, a lease of the ground, with the Scotch Church thereon, was granted to Dr. Blythe, the then minister, the elders of the congregation, and the trustees of Mrs. Drake's donation (3).

In 1829, Dr. Blythe, who had been admitted regularly as pastor by the Scotch Presbytery in London, died, and Mr. Scott having been elected by the congregation, according to the regulations of the church of Scotland, application was made to the Scotch Presbytery in London, to moderate his call, and upon his examination for that purpose it was found, that his tenets were not in conformity with the church of Scotland, and he declined to sign the confession of faith according to the church of Scotland; and he, accordingly, withdrew and resigned his claim as the pastor of the church. No opposition appeared to have been made to this decision of the Scotch Presbytery; but on the contrary, measures were taken to procure another minister, and accordingly several licentiates of the church of Scotland were invited to preach as probationers, and a party in the congregation having requested Mr. Scott again to become a candidate, he was, on the 27th of January 1831, again elected, notwithstanding the remonstrances of the Scotch Presbytery in London; and the consequence of this was, that the Presbytery of Paisley withdrew their licence from Mr. Scott, which sentence was upon appeal to the general assembly of the church of Scotland, affirmed, and all ministers were prohibited from employing him to preach in their pulpits. Notwithstanding that, Mr. Scott continued to officiate as minister, until the 18th of December 1832, when he finally withdrew.

In consequence of the variation in the mode of worship which took place after the death of Dr. Blythe, several members of the congregation withdrew, and, in par-

(3) This was a gift of 30*l.* a year, bequeathed in 1730 "to the Protestant Dissenting Minister," for the time being, of the congregation at Woolwich.

ticular, the plaintiff Milligan, who discontinued his attendance in January 1831, and the other plaintiff, Sharpe, the session clerk, who tendered his resignation in February 1831. This bill was filed on the 21st of March 1833, praying, in effect, a declaration, that the chapel ought to be exclusively devoted to religious worship, according to the form of the established church of Scotland; and for consequential directions.

The defence set up by the defendants, who were elders and trustees, was, that the chapel had not been devoted to worship according to the Scotch church exclusively, but to the Presbyterian form of worship generally. That by the 9th resolution or by-law of 1803, the congregation had the power of altering the bye-laws; and that at a meeting held on the 4th of November 1833, (after the bill had been filed,) the bye-laws had, in fact, been repealed and annulled; that the plaintiffs having withdrawn from the chapel, had ceased to have any interest in the matters of the suit; and they again objected to the present form of the record.

Mr. Wigram and *Mr. J. Russell*, for the plaintiffs.

Mr. Agar, *Mr. E. R. Daniel*, and *Mr. Chandless*, for the defendants.

Nov. 17, 1837.—THE LORD CHANCELLOR. —This was a bill filed by Charles Milligan and Cornelius Sharp, on behalf of themselves and all persons, (except the defendants,) who, at the time of the alleged breach of trust, "were holders of, or are now entitled to be holders of, seats and pews in the church or chapel comprised in the lease of the 14th of July 1800, or entitled to vote at the election of a minister of the church or chapel." The object of the bill was to have it declared, that the lease of the church, or chapel, is held in trust for religious worship according to the institutions and observances of the church of Scotland, with the necessary directions, for the purpose of restoring and confining the form of worship and service of such church and chapel accordingly.

The only questions I have to consider are, first, whether the property in question was held upon the trusts alleged in the bill; secondly, whether there has been any breach of such trust; and, thirdly, if there

has been, whether the plaintiffs are entitled to be relieved against such breach of trust, in a suit constituted as the present.

As the title to the property commences with the lease of 1798, I have nothing to do with the history of the congregation at an earlier date, except so far as it may throw light upon the purposes of the trust, as originating in that lease. It appears, however, that by an entry in the books of the congregation, dated the 3rd of June 1798, being the proceeding at a meeting, held for the purpose of making arrangements for the building of a new church, the meeting called themselves "The Scotch Presbyterian Church," and directed that a case should be laid before the Scotch Presbytery in London, with a request that they would give it their sanction and support. It also appears, that in the statement prepared for circulation at the time, the object was stated to be to accommodate the members of the established church of Scotland. The project of building a new church was carried into effect by a committee of the congregation, assisted by a committee of the Scotch Presbytery in London. The records of that meeting are headed "Scotch Church;" and in an entry dated the 21st of May 1799, they call themselves "The Scotch Presbyterian Congregation," and state their object to be "to erect a new Scotch Presbyterian Church." At a meeting held on the 5th of July 1799, it was resolved, "that a stone containing the arms and motto of the established church of Scotland should be placed in the front of the new place of public worship." At a meeting of the 10th of June 1800, it was resolved, "that the lease should be in the names of the minister and trustees for managing Mrs. Drake's donation, and their successors in office." The chapel was opened, and two sermons preached by ministers of two other Scotch Presbyterian churches; and at a meeting of the 12th of July 1800, the chapel being now called "The new Scotch Church," it was resolved, "that the treasurer be requested to write to each of the ministers who were members of the Scotch Presbytery in London, to solicit a collection from their congregations, towards defraying the expenses of the building." The will of Mrs. Drake is dated 1730, whereby

she gave 30*l.* to the Protestant Dissenting Ministers at Woolwich, an expression which proves nothing upon the present question; but it appears that the 30*l.* had been received by the ministers of the congregation, at the time when it was clearly a congregation of Scotch Presbyterians. The chapel having been erected, a lease dated the 14th of July 1800, for sixty-one years, was granted, expressed to be in consideration of the expense of erecting the Scotch church or kirk; and it was declared that it should be held in trust, to be disposed of as the elders or trustees of the Scotch church or kirk at Woolwich should direct, and in default of such direction, to be used as a place of religious worship, and for such other purposes as, by the custom of the church or kirk of Scotland, the same ought to be used; and the trustees were not to permit the same to be had or used for any other purpose than such religious worship, and such other meetings and assemblies as by the customs of the kirk of Scotland ought to be there holden, without the consent of the lessors. This is the most important part of the evidence on the first point, as it shews the purpose for which the ground was obtained, and the building erected; and it establishes beyond all doubt the affirmative of the first proposition, that the property in question was held upon trust to be used as a chapel for Scotch Presbyterians.

What followed the opening of the church was in conformity with this view of the case, and strongly confirmatory of it. On the 29th of March 1818, it was resolved, "that no minister receive a call, nor be appointed pastor of the congregation, who has not been licensed to preach the gospel, according to the regulations observed in the established church of Scotland." There is an entry, 24th of April 1807, in which it was stated, that the church was built for the purpose of worship, according to the forms and ceremonies of the church of Scotland, as by law established. On the 25th of February 1811, a question was made, whether there should be singing before and after the service, as contrary to the discipline of the church of Scotland. It was determined there should not. In answer to this, the evidence on the behalf of the defendants of some practices, said

to be contrary to the practice of the established church of Scotland, cannot be of much avail.

[His Lordship here stated the death of Dr. Blythe in 1829, the election of Mr. Scott, and the subsequent proceeding until his ultimately withdrawing, and then continued—]

Now, it appears to me to be clear, that the chapel was originally built, and the house obtained for the purpose of worship according to the Scotch church; that it continued to be used for that purpose for upwards of thirty years; it was, therefore, held upon trust for this purpose. The cases of *Craigdallie v. Ackman* (4), *Attorney General v. Pearson* (5), and *Foley v. Wontner* (6), leave no doubt of the law on this point.

The second question is equally clear, and in fact little, if any, question is made about it. The second election of Mr. Scott, unless made in the hope that he might conform to the confession of faith of the church of Scotland, and be accepted by the Presbytery, was in itself a constructive breach of trust; and undoubtedly the continuing to receive and employ him as minister, after his licence had been withdrawn, and that sentence confirmed by the general assembly, was a direct departure from the trusts of the lease, and in open violation of the rules and regulations of March 1803, as was the subsequent mode of providing for the service of the church, and above all the attempt to get rid of the rules and regulations of March 1803, by the resolutions of the 4th of November 1833; and the issue joined by the defendants is not whether the present be or be not a departure from the custom of the Scotch Presbytery and the church, but whether the majority of the congregation have not a right to depart from it, and whether they have not effectually done so by the resolution of the 4th of November 1832. I must consider the church as vacant, and I have to consider, according to what rule the election and appointment of the minister ought to take place; and for this purpose it is necessary to consider, not only what the original trust on which the

lease and building were held; but how far the parties to the resolution of the 4th of November 1833 were competent to alter such trust, and devote the lease and building to other purposes; and this question may be solved without precisely defining the extent of the power of altering the rules and regulations of the 29th of March 1803, as restricted by the 9th of these rules. The resolution of the 4th of November 1833 was not an attempt to alter the law by the existing congregation, as contemplated by the rules and regulations, under which pew-holders of six months standing, and being therefore members of the congregation, are constituted voters, and by which rules and regulations, no person taking a seat after the church had become vacant, which was probably to be dated from the death of Dr. Blythe, in September 1829, would have been entitled to vote; but the resolution of a meeting of persons calling themselves the congregation, who, from the course pursued by the re-election of Mr. Scott in 1831, must have compelled many of the congregation who were members of the church of Scotland to withdraw, and composed probably of many members who were not entitled to vote, according to the rules and regulations which they assumed the power of rescinding. But if it were necessary to come to any conclusion, as to the extent of the power of altering the law by persons entitled to vote, it might safely be assumed such power did not extend to alter the fundamental principle on which the association had been formed, and destroying the trust on which the property was held, but only to altering laws and making new ones, as far as might be consistent with such principles and trust. It will be observed, that the object of making the rules and regulations, is upon the proceeding stated to be for the purpose of preventing feuds and controversies, and preserving order and unanimity in the Scotch Presbytery church or kirk at Woolwich. I am, therefore, of opinion, that the course adopted by the defendants amounted to a breach of trust.

It still remains to be considered, whether the plaintiffs are entitled to be relieved as against such breach of trust, in a suit constituted as this is. It is proved, that the plaintiffs are trustees for Mrs.

(4) 1 Dow, 1; s. c. 2 Bligh, 529.

(5) 3 Mer. 353.

(6) 2 Jac. & W. 245.

Drake's charity, and that Mr. Milligan was one of the elders. They are, therefore, trustees, though the lease is not legally vested in them. It is also proved, that both were pew-holders at the time the wrong was committed, and had done what was requisite to entitle themselves to vote. They were, therefore, entitled to all the privileges of members of the congregation; they were therefore *cestuis que trust* of the property in question, and entitled to the assistance of this Court, to enforce a due execution of the trust in which they are so interested. So were the plaintiffs in the cases of *Davis v. Jenkins* (7) and *Foley v. Wontner*. Of their title to sue, I have, therefore, no doubt.

Then objections are made to the form of the bill, that the other *cestuis que trust* who were members of the congregation at the time the wrong was committed, are by the rules and regulations to be considered as entitled to the benefit, and who are, I think, accurately described upon this bill as parties in whose behalf the plaintiffs profess to sue. The object of the bill is for the common benefit of all such persons, according to the purposes for which they were associated, and, therefore, within the rule, which, in such cases, permits bills to be filed by some in behalf of themselves and others. It is obvious, that in no other way could justice be obtained for the injury complained of. The defendants allege, that the plaintiffs not having paid their rents, are not now pew-owners, and, therefore have no interest. That they were so entitled when the wrong was committed, is proved; and the defendants cannot, first, by altering the form of worship of the chapel, deprive the plaintiffs and others of their rights, and then allege such deprivation as a legal objection to their title to sue.

I am, therefore, of opinion, that the plaintiffs are entitled to the decree they ask, and I think, the plaintiffs are entitled to their costs out of the fund. The acts which have made this suit necessary being the acts of a large majority of the congregation, I cannot throw the costs upon the defendants; but as they have all concurred in the breach of trust, I do not think them entitled to any costs out of the fund.

At the hearing it was objected, on the part of the defendant, that the evidence could not be read in this cause, on the ground that it had been taken in a cause in which Milligan and Sharpe alone were plaintiffs, and was now tendered in a cause in which they and all others interested were plaintiffs. The objection was supported on two grounds: first, that if this evidence were received, absent parties would be bound by evidence taken in a cause to which they were not then parties; and secondly, that the witnesses could not be indicted for perjury, as their evidence had been taken in a cause differing, as to parties, from that in which the evidence was used.

The LORD CHANCELLOR, however, without hearing the other side, considered the evidence receivable, observing, on the first point, that the persons for whose benefit the plaintiffs sued had a common interest with them, and on that ground the Court permitted the plaintiffs to sue in this particular form, but that the absent persons were not, strictly speaking, parties; and as to the second objection, he said, he could not conceive that there could be any difficulty in indicting for perjury in such a case. The objection, if valid, would prevent any amendment as to parties (8).

Certain books, marked A and B, were tendered in evidence by the plaintiffs, and were objected to by the defendants; they contained the laws for the regulation and management of the chapel, minutes of the committee for building the chapel, and minutes of the Kirk Sessions and proceedings; the latter book was entirely in the hand-writing of the plaintiff Sharpe, the sessions clerk, and they both came out of his custody.

The LORD CHANCELLOR considered that coming out of the proper custody, they were clearly admissible in evidence, as to questions between the present parties.

(8) See *Penfold v. Giles*, 6 Law J. Rep. (N.S.) Chanc. 4.

V.C. }
 Nov. 14; } *In re* PADDINGTON CHARITIES.
 Dec. 12.

Statute 59 Geo. 3. c. 12—Construction—Churchwardens.

The statute 59 Geo. 3. c. 12. applies to freehold land held generally in trust for a parish; but freehold lands held upon special trusts for a parish, and copyhold lands, are not within that statute, and are not therefore vested in the churchwardens and overseers.

A petition was presented in this matter, stating that the parishioners of the parish of Paddington were possessed of certain freehold land, usually called the Bread and Cheese land, upon trust, for the purpose of expending the rents and profits thereof in the purchase of bread and cheese, to be distributed by the churchwardens and overseers for the time being of the said parish, amongst the poor thereof, at Christmas in every year. These lands had been held by the parish from some time previous to the year 1700, but the origin of the charity was not known, nor could it be ascertained in whom the legal estate was vested.

Certain copyhold estates were also held in trust for the use and benefit of the poor of the said parish; and new trustees had been duly appointed from time to time.

Under a reference which had been ordered on a former petition, the Master had approved of persons to be appointed trustees of the freehold estate, and also of a proper person to execute a conveyance to them. He had also approved of persons to be appointed trustees of the copyholds, and of a scheme for the regulation of the charity.

The present petition prayed that the report might be confirmed in all these particulars.

Mr. Rudall appeared for the petitioners, and submitted to the Court, whether, under the 59 Geo. 3. c. 12, the freehold estates were not vested in the churchwardens and overseers of the poor of the parish of Paddington. *The Attorney General v. — (1) and Doe d. Jackson v. Hiley (2)* were referred to.

(1) 2 You. & Col. 352, n.; s. o. nom. *The Attorney General v. Lewin*, 6 Law J. Rep. (N.S.) Chanc. 204.
 (2) 10 B. & C. 885; s. c. 8 Law J. Rep. M.C. 105.

December 12.—*The Vice Chancellor.*
 —The statute 59 Geo. 3. c. 12. s. 17. appears to me to apply to freeholds held generally in trust for a parish, and the cases referred to prove it. But those cases do not affect copyholds; and I think that the statute does not apply to them; nor, as it appears to me, does the statute apply to freeholds held upon special trusts. Therefore, the report must be confirmed as to the scheme, and the other matters according to the prayer.

V.C. }
 Dec. 13. } METFORD V. PETERS.

Practice.—Re-examination of Witness.

A witness, who had been examined by the defendant before the hearing, merely to prove an exhibit, was again examined by the plaintiff after the decree, under a reference to the Master, to prove other exhibits and on other matters; but no special order for such latter examination had been obtained. A motion by the defendant, that the depositions of this witness, on behalf of the plaintiff, might be suppressed for irregularity, was refused, with costs.

This was a suit to obtain payment of a legacy. A decree had been made in favour of the plaintiff, and a reference was ordered to the Master, to inquire whether the legacy had been paid. In the proceedings in the Master's office, the plaintiff, without any special order of the Court, had examined a witness, who had been previously examined in the cause by the defendant. His former examination related only to the proof of an exhibit; and his re-examination by the plaintiff related chiefly, but not exclusively, to the proof of other exhibits.

A motion was now made by the defendant, that the depositions of this witness on behalf of the plaintiff might be suppressed for irregularity.

Mr. Wigram and *Mr. Bethell*, in support of the motion, insisted, that the plaintiff was not entitled to re-examine this witness without a special order of the Court; and cited—

Vaughan v. Lloyd, 1 Cox, 312.
Smith v. Graham, 2 Swanst. 264.

Rowley v. Adams, 1 Myl. & K. 545;
s. c. 2 Law J. Rep. (n.s.) Chanc. 143.
Wormald v. M'Intosh, cited 1 Myl. &
K. 545.

Mr. Knight Bruce and *Mr. Hayter*, contra, contended, that as the defendant had examined this witness only as to an exhibit, the plaintiff was not bound to apply for a special order to re-examine him.

Courtenay v. Hoskins, 2 Russ. 253.
2 *Sidney Smith's Practice*, 143.
Birch v. Walker, 2 Sch. & Lef. 518.

Mr. Wigram, in reply, contended, that a mere exhibit witness might be an exhibit witness again, without any special order; but that a special order was necessary if the parties wished to examine him as to any other matters besides exhibits.

THE VICE CHANCELLOR.—I must admit the existence of the rule, as contended for, so far as it goes to prevent a party who has been examined on one side of a cause from being examined again on the same side, without a special order. The reason given by Sir John Leach, in *Rowley v. Adams*, appears to shew that, because he says, "The rule is well settled, that a witness who has been examined in the cause cannot be examined again before the Master, without an order; and such order is, in general, accompanied with a direction, that he shall not be examined upon any points with respect to which he has been previously examined in the cause; for it would be too dangerous to truth and justice, to afford such a witness an opportunity of mending his testimony, when he had found by the evidence on the other side where the weakness of the case lay." This shews, that the Master of the Rolls understood the rule as I understand it. But the rule is not at all applicable, when one side has called a witness, and examined him in chief before the hearing, and after hearing, the other side wishes to examine the same witness. He is not called to vary his testimony; and if he mends it, he is a witness who is adverse to the party who calls him.

Motion refused, with costs.

M.R. }
Dec. 18. } WYNNE v. WYNNE.

Will—Construction—Forfeiture.

A testator devised an estate in Denbighshire, to his son A, for life, with remainder to B, for life, &c., and declared, that if A. should not within eighteen months after he should become entitled to certain other estates in Carnarvon, sell them and pay the charges on the first estate, then the devise to him should cease. A. became entitled to the second mentioned estates in 1814, and under an agreement with B, he did not sell them, but incurred a forfeiture, B. undertaking to re-grant the estates during their joint lives, at a rent of 850l. This was effected, and A. remained in possession. The mother of A. and B, in 1818, by her will, gave certain benefits to B. and his sisters, and directed, that whenever either of them should come into possession of the estates in Denbigh, his interest in her property should cease. After the death of the mother, it was held, that B. had come into possession within the meaning of her will, and that his interest in his mother's property had ceased.

The facts of this case, so far as are material, were as follows:—Robert Watkin Wynne, by his will, dated in 1806, devised his family estates, commonly called the Garthmeillio or Upper Country Estates, to trustees, for a term of 500 years, for raising such a sum of money as might be wanted in aid of his personal estate, and of another estate, devised to be sold, for the payment and discharge of his debts, funeral expenses, and legacies; and subject thereto, he devised the family estates to his son John, for life, remainder to the use of his son Watkin, (since deceased,) for life, with remainder to the use of his son Charles, for life, with remainder to the use of his daughters Ann and Emma, and the survivor of them, during their lives, with divers remainders over; and after reciting, that his, the testator's mother, was seised of certain estates in the county of Carnarvon, for her life, with remainder to him, the testator, in tail, and that in the event of his mother surviving him the same would go and belong to his son John, as tenant in tail, the testator declared it to be his wish, that in case his same son should survive him, and become entitled in possession

to the last-mentioned estate, that he should, as soon after as he should so come into possession as conveniently might be, sell and dispose of the same, and with the produce thereof pay and discharge all the incumbrances affecting the Garthmeilio estates; and that in case his said son John should not, within eighteen months after he should so become entitled to the Carnarvonshire estate, sell the same, and pay the produce thereof, in discharge of the incumbrances upon the Garthmeilio or Upper Country Estates, then that the devise of the Garthmeilio or Upper Country Estates to him, the said John Wynne, for life, as aforesaid, should cease and determine, as if he were dead.

The testator died in 1806, and on the death of the testator's mother in 1814, John Wynne, the son, became entitled to the Carnarvonshire estates, as tenant in tail, and of which he afterwards suffered a recovery, and thereby acquired the fee simple; he did not, however, sell the same, in compliance with the wish expressed in the will of the testator.

Ann Sobieski Wynne, the testatrix, and the widow of the testator, by her will, dated the 21st of August 1818, after bequeathing certain legacies, and directing the conversion and investment of her property, proceeded as follows:—"And the rest of the income from the said fund, to be equally divided between my three children herein-after mentioned, my daughter Ann Ogilvie, (the wife of James Ogilvie,) my daughter Emma Wynne, and my son Charles Wynne, with this proviso, *that whenever and as any one of the aforesaid named daughters and son shall come into possession of the family property, such individual share of interest money shall devolve to the remaining annuitant or annuitants during their respective lives*, except in the event of my daughter Emma's marriage; if that should happen, I will and desire, that on such marriage, my trustee shall pay to her the sum of 1,000*l.* clear of all deductions, and the remainder of the aforesaid funded property, whatsoever it be, I will and desire may be exactly divided, and after all expenses attending this trust are punctually satisfied, be paid to my daughter Ann Ogilvie, and to my son Charles Wynne, reserving a sufficient sum, the interest of which, amounting to 10*l.* per annum, my son Julius is to be paid

during his natural life, and, at his death, the said principal sum so released, to be paid in equal shares between Ann Ogilvie and Charles Wynne, or their heirs; and I give to my respective children, Ann Ogilvie, Emma Wynne, and Charles Wynne, the power to bequeath their respective shares of property thus left to them, under the conditions provided by this will."

By the decree made in this cause, bearing date the 14th of February 1829, it was referred to the Master, among other things, to inquire whether the children of the testatrix, (Ann Sobieski Wynne,) Ann Ogilvie, Emma Wynne, and Charles Wynne, or any or either, and which of them had come into the possession of the family property, within the meaning of the said testatrix's will; and that the said Master should be at liberty to state special circumstances. The Master, to whom the cause was referred, by his report, dated the 16th of December 1836, found, that by an indenture of lease, dated the 31st of January 1815, made between Charles Wynne, of the one part, and John Wynne of the other part, after reciting that John Wynne, with a view to fulfil the condition annexed to the family estate, had caused the Carnarvonshire estate to be advertised to be sold on the 3rd of January then instant, and that the said Charles Wynne, being next entitled in remainder to the family estates either upon the decease of John, or non-performance of the condition annexed to his estate, had, on the day next before the day of the said intended sale, proposed to the said John Wynne, that if he would not sell the Carnarvonshire estate, in compliance with the wish of the said testator, and thereby forfeit the estate devised to him in the Garthmeilio estate, so as to suffer the said Charles Wynne to succeed him as tenant for life in remainder, under the said will, he, the said Charles, would grant unto him, the said John, a lease of the same for their joint lives, at a yearly rent of 350*l.*, subject to the incumbrances,—it was witnessed, that in consideration of being let into possession of the Garthmeilio estate, he, the said Charles Wynne, did lease the same estate to John during their joint lives, at a yearly rent of 350*l.*

The Master also found, that Ann Ogilvie and Emma Wynne had neither of them come into possession of the family property

within the meaning of the said testatrix's will; but, as to the said Charles Wynne, he submitted to the judgment of the Court, whether, under the circumstances stated, he had come into possession of the said family property, within the meaning of the said testatrix's will.

Mr. Tinney, for Charles Wynne.

Mr. Pemberton and *Mr. Bethell*, for Emma Wynne, contended, it was clear that Charles had come into possession of the family estate, within the terms of the will of his mother; although John was apparently in possession, yet he was a mere tenant to Charles, and the possession of a tenant is that of the landlord. That the fact of a forfeiture having been committed, and the estate having devolved on Charles, being recited in the lease, that fact could not now be disputed by Charles. That although the words in the will of Mrs. Wynne were in the future—"if he *shall* come into possession," yet, the fact of his being already in possession, could make no difference: as, where a legacy is given in the event of a legatee attaining twenty-one, if such legatee had attained that age before the date of the will, still he would be entitled to the legacy. The forfeiture having taken place, the next question was, whether Emma and Mrs. Ogilvie took life interests or absolute interests: they contended that they took absolute interests, for it has been holden, that where income is given indefinitely, there the capital is included.

Mr. White for Col. Ogilvie, cited—

1 *Roper on Legacy*, 59.

Bradley v. Westcott, 13 Ves. 453.

Comber v. Graham, 1 Russ. & Myl. 450.

Philipps v. Chamberlaine, 4 Ves. 50.

Page v. Leapingwell, 18 Ves. 463.

Clough v. Wynne, 2 Mad. 188.

Haig v. Swiney, 1 Sim. & Stu. 487; s. c.

2 Law J. Rep. Chanc. 26.

Elton v. Shephard, 1 Bro. C.C. 532.

As to the case of forfeiture, he cited—

Clark v. Lucy, 5 Vin. Abr. 87.

Yarnold v. Moorhouse, 1 R. & M. 364.

Lewis v. Lewis, 6 Sim. 304; s. c. 3 Law

J. Rep. (N.S.) Chanc. 55, and 4 *ibid.*

77.

Mr. Skirrow and *Mr. Monro*, for Mrs. Ogilvie, cited—

Coke Lit. 206.

Plowden, 132.

Parry v. Boodle, 1 Cox, 183.

Mr. Temple and *Mr. Girdlestone*, for other parties.

Mr. Bethell, in reply.

THE MASTER OF THE ROLLS.—This is one of those obscure and perplexed wills to which it is difficult to attach any consistent and rational meaning: at the same time, it does appear to me, on the result of the discussion, which has been conducted, no doubt, with great ability, that I can come to a conclusion respecting the meaning of this testatrix's will, which is consistent with itself at least, though perhaps not to be accounted for, in all respects, in the way that has been suggested. This lady, it seems, desired all her property to be converted into money, and out of the money, after directing the payment of her funeral expenses and debts, and certain legacies, she proceeds as follows: "All the residue," &c.

The first question that is made here is, as to the interest which each of the children took: is it a life interest, or is it an absolute interest? The counsel for Emma Wynne and Mrs. Ogilvie arguing upon this point, said, this is an absolute interest, because it is a gift of interest or dividends, or a gift of interest indefinitely, and that will not be altered by the last clause of the will, which gives a power of disposition by will; however it proceeds with this proviso—[His Lordship stated it].—She treats them there as "remaining" annuitants; that is, after taking away Charles, who is there supposed to have come into the possession of the family property, if he was the first to do so, which by the limitations in the former will he must have been, she considers them as annuitants therefore, and they may have been perpetual annuitants; but we come afterwards to another part of the will, and we find, notwithstanding the indefinite gift to Julius, she clearly intended Julius was to have no more than a life interest, "reserving a sufficient sum, the interest of which, amounting to 10*l.* per annum, my son Julius is to be paid during his natural life." And taking all these parts of the will together, the indefinite gift of interest, the treatment of annuities, and the express direction that Julius is only to have a life interest, and a proviso, that they are to have a power of disposition by will, I think altogether

him another letter, as follows:—"I have received from Mr. Gatty, the clerk in court in this cause, a note, as follows:— 'Sir,—*Heslop v. Metcalfe*—Are the rules herein to be entered this term? Yours, &c. Gatty. 24th of May 1836.' Tomorrow is the last day for entering the said rules. I beg to say, I shall proceed no further in this cause, unless the request, contained in my letter to you of the 12th of February last, be complied with before one o'clock to-morrow."

The plaintiff immediately employed another solicitor to enter the necessary rules; and in the Trinity vacation the cause was set down for hearing.

Mr. B. had brought a second action against the plaintiff for his further bill of costs, and both actions were still pending.

The present solicitor of the plaintiff applied to Mr. B. to give up the papers in this suit, offering to hold them subject to any lien he might have thereon. Mr. B. refused to part with the papers, but offered to let the plaintiff and his solicitor inspect and take copies of them, and also to produce them at the hearing. Some further communications took place between the two solicitors; and, in July 1837, Mr. B. wrote to the plaintiff's present solicitor, again refusing to part with the papers, but offering to produce them, and allow copies to be taken; and declaring himself ready to go on with the suit, on the plaintiff's previously undertaking to pay him his bill of costs, which would become due to him by reason of his proceeding with the suit.

The plaintiff thereupon presented a petition, praying that all such of the documents relating to this cause, as should be deemed by the plaintiff's solicitor necessary for him to have on the hearing of the cause, might be ordered to be handed over by Mr. B. to the plaintiff's present solicitor, on behalf of the plaintiff, such solicitor giving to Mr. B. his written undertaking to receive such documents subject to Mr. B.'s lien thereon, and to return them within ten days after the hearing of the cause.

The affidavits in support of the petition stated, that it was necessary, for the protection of the plaintiff's interests, that his solicitor should have possession of the papers in the cause.

Mr. Knight Bruce, in support of the

petition, relied on *Colegrave v. Manley* (1).

Mr. Jacob and *Mr. Addis*, contra, contended, that while a solicitor had a lien on his client's papers, the Court would not require him to do more than to let his client have an opportunity of inspecting them and taking copies, and to produce them in court.

Ross v. Laughton, 1 Ves. & Bea. 349.

Moir v. Mudie, 1 Sim. & Stu. 282.

Commerell v. Poynton, 1 Swanst. 1.

Steele v. Scott, 2 Hogan, 141.

Lord v. Wormleighton, Jac. 580.

That, at all events, a sum of money ought to be paid into court by the plaintiff, to satisfy the lien of the former solicitor.

The VICE CHANCELLOR said—that the demand which had been made by Mr. B., was not for money to enable him to carry on the suit, but for payment of his bill; and it appeared to his Honour, that Mr. B. demanded too much when he demanded the bill of costs, which included the costs of the suit, and also of the action, which ought to have been kept separate. It also appeared, that Mr. B. discharged himself; he did not enter the rules. It seemed to his Honour, this was a case brought within the principle of *Colegrave v. Manley*. It was sworn by affidavit, that it was necessary that there should be not only inspection of the papers, but also delivery; and he thought he was bound by that authority.

His Honour, therefore, made the order, as was done in *Colegrave v. Manley*, with the corresponding undertaking; but did not think it necessary to make any such order as was made in that case, respecting the taxation of the bill. The costs of the application to be paid by Mr. B.

From this decision Mr. B. appealed; and the petition was heard before the LORD CHANCELLOR, on the 22nd of December, when his Lordship affirmed the decision of the Vice Chancellor, merely making some slight variations in the language of the order of *Colegrave v. Manley*; and his Lordship directed the undertaking to hold the papers subject to the lien, to be extended to the client as well as to the present solicitor.

(1) Turn. & Russ. 400.

M.R.	} ATTORNEY GENERAL V. THE CORPORATION OF LIVERPOOL. ATTORNEY GENERAL V. ASPINALL.
Nov. 28;	
Dec. 1, 4, 5,	
1835.	
May 25, 27, 30;	
July 4, 1836.	
L.C.	
Jan. 9, 10;	
Nov. 11,	
1837.	

Municipal Corporation Act, 6 Will. 4. c. 76, Construction of—Trust—Injunction—Practice—Appeal.

In cases of injunction, the Court exercises a discretion; so that where the effect of continuing an injunction would have been to exclude a question on a doubtful statute from ever being discussed, and no apparent danger to the property was shewn, the Court dissolved the injunction.

When any act, involving a breach of trust, is intended to be done, though not in its consequences irremediable, the Court will prevent it by injunction.

It is an established rule, that where a party obtains an ex parte injunction by misrepresenting the facts of the case, he shall not afterwards be permitted to support the injunction, by shewing another state of circumstances in which he would be entitled to it.

By the Municipal Corporation Act, all the property then belonging to corporations included therein, became, from the passing of the act until the election of the new officers, held by the old corporation in trust for the public for the purposes mentioned in that statute.

*Between the passing of the above act, and the election of the new officers, the old corporation raised out of its property a sum of 105,000*l.*, and appropriated the same towards the better endowment of the clergy of the town, who were inadequately provided for:—Held, that such an application of the funds was contrary to the spirit of the act, and on the part of the old corporation, a breach of trust.*

If the income of a fund be devoted to a trust from a particular day, every party in whom such a fund is vested is bound to hold and manage it so as to have the fund applicable to such purposes at the time, whatever may become of the intermediate profits.

The jurisdiction of this Court cannot be
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taken away by another jurisdiction having cognizance given to it in the same matter. Neither the 97th section of the above act, giving a special remedy by appeal to His Majesty, nor any other section of the act, deprived this Court of its jurisdiction over corporate property held by the old corporation in trust for the purposes mentioned in the act.

On an appeal from an order of the Court below, allowing a demurrer to the whole bill, the appellant is entitled to begin.

The questions in this case arose on the construction of the Municipal Corporation Act, 6 Will. 4. c. 76 (1); and the circumstances which gave rise to the proceedings in this cause are shortly as follows.

Previous to the passing of this act, (9th September 1835,) the corporation of Liverpool were the patrons of several churches in that town, the ministers of which received stipends or allowances amounting in the whole to 5,695*l.* a year; of which 1,080*l.* was paid under endowments by virtue of certain acts of parliament; 510*l.* out of pew rents; 100*l.* payable out of the funds of the corporation; 450*l.* by rates levied under acts of parliament; 1,040*l.* gratuitously paid out of parish rates; and 2,515*l.* gratuitously paid out of the funds of the corporation. It appeared, that before the passing of the Municipal Corporation Act, various attempts had been made to bring about a permanent arrangement between the parish and the corporation, for the purpose of providing for the permanent future support of the several ministers. These attempts, however, failed; and after the passing of the act, but before it came into operation, the old corporation determined to make a proper provision for the ministers, and also to augment the stipends paid to the incumbents and their curates. To carry their intention into effect, they resolved to raise the sum of 105,000*l.*, upon the security of part of the corporation property—namely, the salt-house dock estate, of the annual value of 3,000*l.*, and the tobacco warehouse, of the annual value of 4,000*l.* This sum of 105,000*l.*, when raised, it was proposed to vest in trustees, who were to divide the

(1) See 13 Law J. Stat. p. 181.

dividends and annual income arising from it among the incumbents of the several churches in the borough. To prevent this intention from being completed, the original information in this case was filed by the Attorney General at the relation of two of the inhabitants of Liverpool (one of whom was a burgess), against the corporation of Liverpool, praying an injunction to restrain them from carrying their intentions into execution. The information, after detailing the intentions of the present corporation, stated, that by virtue of an order of His Majesty in council, all the functions of the then governing body would cease on the 26th of December 1835, when new councillors were directed to be chosen; and it submitted, that the intended acts were in contravention of the scope of the act of parliament, and the intention of the legislature, and prejudicial to the rights and interests of the rate-payers of the borough of Liverpool. It proceeded to shew, that the debts of the corporation amounted to 792,000*l.*; and that after paying the charges thereon, the income of the corporation would be insufficient to pay the expenses of police, and of the administration of justice, by the act directed to be paid out of the corporate funds, which expenses, in case of a deficiency of the corporate funds, were to be paid by a rate on the inhabitants. It then charged, that part of the corporation income was fluctuating and uncertain, whereby the chance of a deficiency was increased; that the common council, who were a self-elected body, had, contrary to the wishes of the burgesses, with fraudulent and improvident haste, resolved to carry their scheme into effect before the termination of their functions.

The material allegations being supported by affidavit, an *ex parte* injunction was, on the 14th of November, granted by the Master of the Rolls (Sir C. C. Pepys); and which, on the 28th, the defendants moved to dissolve.

It is here necessary to advert to the terms of the different sections of the Municipal Corporation Act on which the questions in this cause rested.

By the first section it is enacted, "that so much of all laws, statutes, and usages, and so much of all royal and other char-

ters, grants, and letters patent, now in force relating to the several boroughs named in the schedules (A.) and (B.), to this act annexed, or to the inhabitants thereof, or to the several bodies or reputed bodies corporate named in the said schedules, or any of them, as are inconsistent with or contrary to the provisions of this act, shall be and the same are hereby repealed and annulled." The 68th section provides, that all stipends to ministers of any church or chapel, which had been usually paid for seven years prior to the act, shall be secured to the person accustomed to receive the same.

The act then proceeds to provide for the constitution, regulation, and power of the future municipal corporations; and in the 92nd section it commences the regulations as to the corporate property. This section enacts, in effect, that after the election of the treasurer in any borough, the income and annual produce of all the property of any body corporate named in conjunction with such borough, in schedule (A.), should be paid to the treasurer of such borough; and that all the monies which he should so receive should be carried by him to the account of a fund, to be called 'The Borough Fund': and that such fund, subject to the payment of any lawful debts due from such body corporate, and saving the claims of all persons upon the real and personal estate of such body corporate, should be applied to the payment of the salaries of the mayor of the borough, and other officers in such act mentioned, and also towards the payment of divers expenses therein mentioned connected with the municipal regulations to be made by virtue of the act, and with the police and administration of justice in such borough, and of all other expenses not therein otherwise provided for, which should be necessarily incurred in carrying into effect the provisions of the act; and that *in case the said borough fund should be more than sufficient* for the purposes to which the same was by the act made applicable, the surplus thereof should be applied under the directions of the council, to the public benefit of the inhabitants, and the improvement of the borough; and *in case the borough fund should not be sufficient* for those purposes, the council of such borough

was thereby authorized and required to order a borough rate, in the nature of a county rate, to be made within the borough, for the purpose of raising so much money as, in addition to such fund, would be sufficient for the payment of the expenses to be incurred in carrying into effect the provisions of the act."

The 94th section restrains "the council of any body corporate to be elected under the Act" from selling, mortgaging, or alienating any land (except under an agreement or resolution made prior to the 5th of June 1835), or from leasing, for a longer term than thirty-one years, without licence from the Lords of the Treasury.

The 97th section enables the council first to be elected, to call in question all purchases, sales, leases, and demises not made in pursuance of some such *bonâ fide* contract made before the 5th of June, and all contracts for the purchase, sale, lease, or demise of any lands, tenements, and hereditaments, and all divisions and appropriations of the monies, goods, and valuable securities, or any part of the real or personal estate of which, on or before the 5th of June in this present year, the body corporate of which they are the council, whether in their own right, or as trustees for charitable or other purposes, was seised or possessed, which shall have been made or contracted between the said 5th of June, and the day of the declaration of their election; and for that purpose, if they believe the same collusively made, or for an inadequate consideration, to cause the value of the lands in question to be inquired of and found by a jury; and if the jury shall find that no consideration, or an inadequate consideration, shall have been collusively given, the purchaser is to have his option to re-convey the lands in question, and abandon the contract, or to pay the full consideration. Powers and directions are then given to effect this by means of a jury; and it is then provided, "that it shall be lawful for His Majesty, if he shall think fit, by the advice of his privy council, upon petition to him, setting forth the special circumstances under which any purchase, sale, lease, demise, contract, or appropriation of any of the said lands, &c. shall have been made since the said 5th of June, to order that the same shall not be

called in question under the provisions of this act; and in such case as last aforesaid the same shall not be called in question, or set aside or affected under the provisions of this act."

By the 139th section, all advowsons and church property belonging to the corporations are directed to be sold, and the proceeds invested, and the income paid to the treasurer as part of the borough fund.

Mr. Pemberton, Mr. G. Turner, and Mr. Pitman, now moved to dissolve the injunction.

Mr. Bickersteth, and Mr. Booth, contra.

For the defendants, on the several arguments, it was contended, that, independent of the act, no Court had any jurisdiction to interfere with the management by a corporation of its private property—*Attorney General v. the Corporation of Carmarthen* (2), *The Mayor of Colchester v. Lomten* (3), *Attorney General v. Heelis* (4); and it was only in a case where the corporation were trustees that the Court could interfere—*Attorney General v. the Mayor of Dublin* (5), *Attorney General v. the Mayor of Carlisle* (6); that the 92nd clause had no operation till after the appointment of the treasurer, and that till that event took place, the corporation, under its old governing body, was entitled to dispose of the corporation property as freely as if the act had not passed; that the act was a new law, by which rights and interests not before possessed by the inhabitants of boroughs were given to them, and by which the corporations, as distinguished from the inhabitants not members of the corporation were deprived of the exclusive interests which they previously had; and that, by analogy to the case in which an offence is constituted by a new law, which, at the same time, directs a specific mode of prosecution, no other mode of proceeding should be allowed—

Stradling's case, Plowd. 206, b.

Foster's case, 11 Co. 37.

Castle's case, Cro. Jac. 643.

(2) Coop. 30.

(3) 1 Ves. & Bea. 226.

(4) 2 Sim. & Stu. 67; s. c. 2 Law J. Rep. Chanc. 35, 189.

(5) 1 Bligh, n.s. 312; s. c. 3 Cl. & F. 289.

(6) 2 Sim. 437.

King v. Dixon, 11 Mod. 337.

The King v. Dickenson, 1 Saund. 135, b, n.

And hence the plaintiffs ought to proceed exclusively in the mode pointed out by the 97th section: that the object of the corporation was laudable, and the effect beneficial to the inhabitants of Liverpool; and the money expended would, to some extent, be received back on the sale of the advowsons under the 94th section of the act.

On the other hand, it was contended by the plaintiffs, that the act of parliament bound the property, or at least fixed a trust upon it, from the time of its passing; and that any appropriation of the property which withdrew the application of the income from the purposes intended by the act, after the appointment of the treasurer, ought to be considered as inconsistent with the spirit of the act, and a fraud upon its provisions. The rate payers, it was said, were the persons liable to make good any deficiency of the borough fund to answer the purposes of the act; and that as soon as the act was passed, and the trust thereby attached, they had a right to insist, in a court of equity, that the property should not be so dealt with as to withdraw the future income from its application to the particular purposes mentioned in the act in the order thereby directed: that this case did not fall within the terms of the 97th section; and even if it did, this Court was not thereby deprived of the general jurisdiction it possessed over all cases of trust.

Arthur v. Bokenham, 11 Mod. 148.

Vernon v. Blackerby, 2 Atk. 144; s. c. Barn. 377.

Peckel v. Fowler, 2 Anat. 249.

Attorney General v. Duke of Marlborough, 3 Mad. 498.

Amy Townsend's case, Plowd. 111.

Millar v. Taylor, 4 Burr. 2303.

Beckford v. Hood, 7 Term Rep. 620.

Doe v. Bridges, 1 B. & Ad. 847; s. c. 9 Law J. Rep. K.B. 113.

Hill v. Reardon, 2 Russ. 608; s. c. 4 Law J. Rep. Chanc. 127.

Lloyd v. Lord Trimlestown, 4 Sim. 996. were cited during the several arguments.

Dec. 1.—The MASTER OF THE ROLLS, having stated the circumstances, said,—As I have found grounds to support the

order I propose to make, independently of expressing any opinion on questions of great importance which may arise in the construction of the act, I do not intend giving a judicial opinion on any of those questions.—[After referring to the 1st, 25th, 30th, and 58th sections, his Honour proceeded:] If the 92nd clause be taken by itself, and considered as if it stood alone, there is not, in my opinion, the slightest doubt that it gives the Court jurisdiction to interfere. Cases were cited to shew (what cases were not required to prove) that the Court has no jurisdiction over a corporation which has controul over its own property. But although a body having a corporate existence is capable of acquiring and possessing property, and therefore also of disposing of it; yet if property is held by a corporation as trustees, if a corporation holds it clothed with public duties, the Court has always asserted its right to interfere. In the case of *The Attorney General v. the Mayor of Dublin*, which was argued in the House of Lords, this proposition was assumed throughout. Now, upon this act the right of property in the corporation is entirely altered. That which may have heretofore constituted their own property, and which they may have held as owners, they now hold by virtue of the act, subject to certain duties; and it would, indeed, be a singularly strong case, in which this Court should refuse to exercise its jurisdiction to prevent a violation of trust, supposing a case of breach of trust to be made out against them.

It is argued that, even admitting this to be the effect of the act, still there is an interval during which the act does not come into operation, the period between the time when the act passed and the 1st of November, or, as it was subsequently fixed by the order in council, the 26th of the present month, and that during the intermediate period, the corporation are therefore left with all the powers which they had before. The conclusion sought to be deduced is, that those who hold property subject, after the expiration of a few weeks, to certain public trusts, are to be considered as now having the sole and uncontrouled power of disposing of that property as they please. The result would

be, that the corporation, if they have power over it as property, have the power not only of selling it, but of granting it out in perpetuity and destroying it; an argument which is quite impossible to be maintained; for, inasmuch as by law a trust is affixed on this property, which, from a day certain, is devoted to particular public purposes, although the trust is not to come into active operation until the 26th of the present month, those who hold the property in the meantime have not the power of dealing with it except subject to the provisions of the act, which controuls their original right. I have no doubt, therefore, that it is in the power of the Court to interfere on the information in order to protect and preserve the property for the purposes pointed out by the 92nd section. Whether it would be a prudent or wholesome exercise of the discretion of the Court to use that jurisdiction, is a totally distinct question; and I only advert to it now, lest I should be supposed to acquiesce in the doctrine urged at the bar, that the Court has no jurisdiction to interfere to prevent property being dealt with in a manner inconsistent with the intention of this act. [His Honour next adverted to the 68th, 94th, and 139th sections.] In this state of circumstances, and with this provision, what the corporation of Liverpool have proposed to do is beyond all question for a very laudable purpose; but if what is now suggested can be legally carried into effect, it would give to the clergy a priority over the other objects provided for by the 92nd section. It is therefore a fair subject of contest between the parties, and which they are entitled to put in a train of adjudication. It is not a matter of anything like certainty, whether the case falls within the 97th clause at all, but if it does, then another question arises, namely, what is the effect of the provision giving to the King in council the right to prevent the new council from instituting any proceeding, for the purpose of setting aside the appropriation of the property made in the interval between the passing of the act and the time when the act comes into operation? Into these, which are both questions of very considerable difficulty, it is not at present necessary, nor do I intend, to enter. The effect of continuing

the injunction would be to exclude them from being ever discussed; for, if I formed a wrong opinion as to the construction of the clause, and, acting upon that opinion, maintained the injunction, it is quite clear that the defendants would be shut out from the means of raising those questions, and of having my opinion reviewed. It is obvious, therefore, that to continue the injunction, instead of being, as it ordinarily is, the means of preserving rights, would, in this instance, operate to destroy them.

On the other hand, the only object I could have in continuing the injunction, would be to protect the property, that is to say, to prevent its being exposed to any danger from the act proposed to be done. Now, I do not find, on looking through the affidavits, that any danger exists as to the property in question. 105,000*l.* is a large sum of money, but the case is not put upon that; it is not put upon the circumstance of there being any danger from the mode in which the property is intended to be dealt with; and although the property may be mortgaged, the mortgage money is to be invested, and the persons, whoever they may be, who are hereafter to administer that property, will have the property in mortgage, or will have the mortgage money in their possession.

Balancing the inconveniences which would arise from continuing the injunction, and from dissolving it, I should unquestionably run much greater risk of doing mischief by continuing the injunction than I can do harm by dissolving it. I think, therefore, exercising the discretion which is vested in the Court in cases of this kind, that my proper course is to dissolve this injunction.

It was said at the bar, that the Court has no jurisdiction to interfere in questions of this sort; and the case of *Pechel v. Fowler*, which, I believe, has been overruled as often as it has been considered, was cited in support of that proposition. It has become the invariable practice, when any act involving breach of trust is intended to be done, though not in its consequences irremediable, where, for instance, trustees contract to sell without proper care, or in a way which the parties interested consider inconsistent with the trust, to apply to the Court to prevent them. The case

cited would go to this extent, that the Court ought never to interfere. Parties might deal with the property just as they pleased, and while the suit was pending no new right could be acquired. Without adverting to more recent authorities or to modern practice, the cases of *Curtis v. the Marquis of Buckingham* (7), and *Echcliff v. Baldwin* (8), prove that such is not the practice, at least in this court, whatever be the rule in the Court of Exchequer. It was therefore quite of course to grant the injunction.

A very wholesome rule, it is true, has been established in this court, that if a party comes for an *ex parte* injunction, and misrepresents the facts of the case, he shall not then be permitted to support the injunction, by shewing another state of circumstances, in which he would be entitled to it, because the jurisdiction of the Court, in granting *ex parte* injunctions, is obviously a very hazardous one, and one which, though often used to preserve property, may be often used to the injury of others; and it is right that a strict hand should be held over those who come with such applications. The objection here taken is not that the facts were not stated, but that the whole law was not stated; that is to say, that the attention of the Court could not have been called to certain provisions of the act, which would have presented a different view of the case to the mind of the Judge. If fault is to be found with any one, it is, I am afraid, with the Court, which is bound to know every clause in every act that ever passed, a degree of knowledge hardly to be hoped for. I never heard the rule carried to this extent, that the party applying is bound to lay the whole law before the Court: whether they have a right to carry it into effect, it is not now my intention to determine, my object being to let things remain as they are until this important question can be regularly brought on for solemn argument and decision.

Under these circumstances, although exercising the discretion vested in the Court, I consider it my duty to dissolve the injunction, without costs.

Injunction dissolved.

(7) 3 Ves. & Bea. 168.

(8) 16 Ves. 267.

Dec. 4, 1835.—The injunction having been dissolved, *Mr. Bickersteth* and *Mr. Booth* now moved for an injunction to restrain the defendants from investing the 105,000*l.* (which had been partly raised) in the hands of the Grand Junction Railroad Company, contending, that the intention was improvident, and the alleged security being a mere uncertain speculation, the Court would not sanction the investment of the trust funds on such a security. *Mr. Pemberton* and *Mr. G. Turner*, contra.

The MASTER OF THE ROLLS, on the following day, after referring to the act of parliament relating to the company, and the amount of monies already laid out on the works, the value of the property of the company, and the remedies provided by the acts for the mortgagees, &c. of the company, said, that there had not been laid before him such a case of improvidence or danger as to call for the interference of the Court; and he must therefore refuse the application, but without costs.

The corporation then borrowed the sum of 63,440*l.* on the security of the corporation estates; and this, with other corporation monies, amounting together to 105,000*l.*, was paid over to James Aspinall and other defendants, and the trusts thereof were declared, by an indenture of the 21st of December 1835, to be for the different ministers of the churches in Liverpool; and it was provided, that they should receive the same in satisfaction of a yearly assessment directed to be made under two local acts, and of all stipends, &c. made during seven years before the 5th of June last.

The old members of the corporation went out of office on the 26th of December 1835, when councillors were chosen for the borough, and the mayor and aldermen were chosen, in conformity with the provisions of the act. A supplemental information was afterwards filed against James Aspinall, and the other trustees, and the corporation of Liverpool, and against the several clergymen, praying a declaration that the appropriation of the 105,000*l.* was unlawful and invalid, and for consequential directions.

To this information, the defendant Aspinall and others put in a general demurrer for want of equity.

May 25, 27, 30, 1836.—*Mr. Pemberton*, and *Mr. G. Turner*, in support of the demurrer.

The Attorney and Solicitor General (as counsel for the relators), and *Mr. Kindersley* and *Mr. Booth* in support of the information.

July 4.—**LORD LANGDALE**—[after stating the circumstances of the case, proceeded]—The considerations for the appropriation of the monies for the endowment of the clergy were as follows: first, the persons chargeable with the rates or assessments authorized by the statute 10 & 11 Geo. 3, and the 26 Geo. 3, were relieved from those rates; second, the corporation funds were relieved from the allowances which had been afforded for seven years; third, the corporation acquired such, if any, advantage, as might be made by sale of the increased value of the advowsons and rights of presentation; fourth, the inhabitants of Liverpool of the established church acquired what is alleged to be the advantage of a better endowed clergy.

The present information alleges no fraud, collusion, or improvidence. It does not allege as facts several important circumstances which are stated to be charged in the original information, but proceeds on the ground that the appropriation was illegal, and that the Court has authority which ought to be exercised to set it aside. Both the grounds depend on the construction of the act of parliament—[His Lordship here referred to the different sections of the act]. I think that, upon the construction of the act, the legislature did not mean the old governing body of the corporation to be at liberty to dispose as they pleased of the corporate property during the interval between the passing of the act and the appointment of the treasurer, but did not mean to restrict the old governing body to the extent contended for by the relators.

It appears to me, that under the 92nd section, the corporate property became, to some extent, affected by a trust immediately on the passing of the act; but that this trust was not intended, under all circumstances, to prevent the old governing

body from alienating or appropriating the property, the income of which, if not alienated or appropriated, would have formed part of the borough fund.

The 97th clause is very important; and two questions arise upon the construction of it, whether the appropriation complained of falls within its provisions; and if it does, whether the proceeding thereby directed excludes or makes it unfit to exercise the jurisdiction of this Court.

Now, as the appropriation here in question was an appropriation of the monies or estate of the corporation made between the 5th of June and the day of the election of the council, it is (if we stop at the description) to be considered as falling within the number of those acts which the new council was authorized to call in question.

But it is said, that the generality of the description is cut down by the subsequent words of the same clause, which direct the mode of procedure; but I cannot say that the general effect of the preceding words does appear to me to be taken away by the words directing the mode of proceeding; and I therefore think that, under the 97th clause, the new council might, if they had thought fit, have called in question the appropriation which is the subject of this information. But I think, that the provision of the particular remedy given by the 97th clause does not exclude the jurisdiction of this Court, if a proper case for relief were made.

Does the supplemental information shew such a case as makes it proper for this Court to interfere? There is no allegation of fraud, collusion, or improvidence, or of any injury done or likely to happen to the rate payers or inhabitants.—[His Lordship here referred to the particular charges in the information.]

On the whole of this case, conceiving that, to some extent, and to some purposes, a new trust did attach on the corporate property on the passing of the act, but that the old governing body was not forbidden or precluded from a fair application of the corporate property for the benefit of the inhabitants—not being able to say, that an application of the property for the more secure endowment of the ministers of the established church, performing divine service in the churches and chapels of the borough, is not, under the

circumstances of this case, an application which must legally be considered beneficial to the inhabitants of the borough—considering the case within the meaning of the 97th section—without saying that, in no case whatever, this Court might not have had jurisdiction, although the 97th clause was applicable; but thinking it a case in which the remedy given by that section ought to have been resorted to, and having regard to the nature of the charges in the information, it does not appear to me that, supposing all the allegations which it contains to be true, I could decree the relief which is prayed for, or any other relief; and therefore, I think that the demurrer ought to be allowed.

Demurrer allowed.

The relators appealed from this decision.

Jan. 9, 10.—*The Attorney and Solicitor General*, as counsel for the relators, and *Mr. Kindersley*, and *Mr. Booth*, in support of the information.

Mr. Pemberton, *Mr. Wigram*, and *Mr. G. Turner*, in support of the demurrer.

Nov. 11.—*The Lord Chancellor*.—If the property in question be subject to any public trust, and if the appropriation complained of be not consistent with such trust—and if there be not, in the Municipal Corporation Reform Act, any provision taking from this Court its ordinary jurisdiction in such cases, then it will follow, that the Attorney General has, under the circumstances stated, a right to file an information, and to pray that the fund may be recalled, and secured and applied for public, or, in other words, charitable purposes, to which it is, by the act, devoted.

I will consider these three questions in their order. First, is the property in question (according to the statement in the information) subject to any trust? It is immaterial to consider what were the powers of the corporation over this or their other property before the passing of the Municipal Reform Act. By the first section of the act, the laws and usages, authorizing the exercise of the power of the corporation, so far as they were inconsistent with or contrary to the provisions of the act, were, from the time of the passing of the act, annulled. The 92nd section gives no power to touch the principal of any part of the corporate property—the

income alone constitutes the borough fund. The whole of the income is, in the first place, subject to the payment of the corporation debts, and afterwards to other purposes, all of a public nature, and in which the inhabitants at large have a direct interest—not only as entitled to participate in the benefit to arise from the execution of such purposes, but because the deficiency is to be raised upon them by a rate.

The 94th section restrains the new council from selling, &c. any lands of the corporation; and not only regulates the power for the future, as to dealing with the hereditaments of the corporation, but invalidates any contracts inconsistent with such regulations made after the 5th of June.

This, and the 95th and 96th sections, are confined to lands, tenements, and hereditaments; and there do not appear to be any provisions respecting any appropriation of any other property of the corporation prior to the passing of the act, except those contained in the 97th section. This section is most important to be considered on two grounds—first, from the evidence it affords of the intention of the legislature as to the appropriation of other property besides lands, tenements, and hereditaments; and secondly, as to the question raised for the defendants, that the jurisdiction of this Court is ousted, by that clause having provided another remedy for the cause of complaint raised by the information.

I proceed, at present, to consider only the first of those points. As it was thought right that the new council should have the power of calling in question acts relative to the corporate property carried into effect before the period of their election, it was absolutely necessary to give a distinct legislative authority; because, in the first place, prior to the passing of the act, there could be no mode of impeaching any acts of the corporation, however improper; and secondly, because the identity of the corporation continuing, notwithstanding the alteration effected by the act, any such attempt on the part of the new council would be an attempt by the corporation to impeach its own acts. Such provision, therefore, was absolutely necessary; and the obvious intention of this clause was, to subject all acts of the corporation, after the 5th of June, affecting any disposition

of the corporate property, to revision; and for that purpose, (confining myself to the words which alone can be thought applicable to the present case,) it makes it lawful for the council to call in question all sales, &c. of lands, &c. and appropriation of monies, &c. There is some obscurity in part of this clause. The expressions used in the directions, as to summoning a jury, are, it was contended, to be confined to lands, tenements, and hereditaments. Upon that, I give no opinion; but, supposing them to apply to appropriations of personal as well as of real property of the corporation, the intention to be inferred from the whole clause is obviously to secure the corporation, and therefore the public, from all appropriations of property, after the 5th of June, made collusively for less than the full value; and the word collusively, though not used in a bad sense, would certainly include persons taking a part of the corporate property for their own benefit, with the knowledge of the circumstances of the property, and of the question that would arise as to the rights of the corporation to make such alienations. In my opinion, the 92nd section did not require the aid of others, and particularly of the 97th section; but, taking the whole together, I cannot doubt but that a clear trust was created by this act, for the public, and therefore, in the legal sense of the term, for charitable purposes, of all the property belonging to the corporation at the time of the passing of the act; and that the corporation, in its former state, holding, as it did, the corporate property until the election of the new council and treasurer, were in the situation of trustees for those purposes, subject to the restrictions specifically imposed by the act, and subject to the general obligations and duties of persons in whom trust property is vested. That the application of the income of the property to the particular purposes specified in the act, was not to commence until a future time—namely, the election of the council, and the appointment of the treasurer, cannot affect the question. If the income of a fund be devoted to a trust from a particular day, every party in whom such a fund is vested, is bound so to hold and manage it as to have the fund applicable to such purposes at that time, whatever may become of the intermediate profits.

NEW SERIES, VII.—CHANC.

Upon the first point, therefore, I am clearly of opinion, that, from the time the act passed, the corporate property was trust property.

Secondly, assuming that the corporation property was, from the 26th of December 1835, trust property, applicable, after the appointment of a treasurer, to the several public purposes prescribed by the act, the second question is, whether the transactions relative to the 105,000*l.*, as stated in the supplemental information, were consistent with such trust, or conformable to the provisions of the act. In the first place, they consisted, in part, of a mortgage of part of the property of the corporation, which the new council are, by the 96rd section, prohibited from making; but principally, it was an appropriation of a portion of the income of the corporate property, for purposes which, however laudable in themselves, and beneficial to the interest of the inhabitants, cannot, according to the statement of the information, be said to be consistent with the trust to which the property was, by the act, devoted, or conformable to the provisions of that act. The whole of the income is, by the act, made primarily liable to pay the interest of the debt, and, at the discretion of the new council, to the payment of the principal, and next in making the several other payments. Whether there will be any surplus of such income, is not stated; and that probably must depend upon the discretion to be exercised by the new council as to the payment of any part or the whole of the principal of the debt out of the income of the property—a discretion which, by the appropriation in question, is taken away to the extent of the interest of 105,000*l.*

Again, although there is no statement that there will not be a surplus income after payment of the prescribed expenses, yet there is no statement that there will be any surplus; the whole income being primarily liable to those payments, the inhabitants, and the Attorney General on their behalf, may justly complain of a diversion of any part of the income, whilst those objects remain unprovided for. A trustee cannot justify the application of part of the trust fund to other purposes, by suggesting that enough will remain of the fund to answer the purposes of the trust. The appropri-

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ation in question has not been defended on the ground of its being an appropriation for a full consideration under the 97th section. The appropriation referred to in this section seems to be a disposition for which an equivalent in money or other property was, or was intended to be, received by the corporation; and not an appropriation, the consideration for which was services or a benefit to the public. But even if that were so, the services or benefits reserved by the arrangement with the clergy could not be supported on that ground, as the new provisions exceed what they could claim without it; and although the individual ministers gave up the right to receive the several stipends raiseable by the rates, the sums so given up are not equal in amount to the sum secured by the arrangement. The amount of the rates so given up is not receivable by the corporation in lieu of the interest of 105,000*l.*, appropriated in exchange for them, nor are they, as it is alleged, payable by the same persons who will have to pay the borough rate in case of the deficiency of the borough fund.

A case may certainly be supposed of the income of the corporate property being so large, that after providing for the payment of the interest of the debt due by the corporation, and so much, if any, of the principal as the council may think it advisable to pay, and after supplying the means of defraying the expenses of all the other services directed to be paid by the 92nd section, a surplus will remain applicable, under the provisions of the section, to the public benefit of the inhabitants and improvement of the borough. Under such circumstances, the appropriation in question might be most proper; but at whose discretion, and under whose direction, is the application of the surplus to be so made? Not of the corporation, as it existed before the election of the council, and before any surplus could be ascertained; but by the new council, and after previously providing for all the prior objects, if the existence of such surplus should have been proved.

It must also be observed, that the payments directed to be made to the ministers of the churches or chapels, out of the income of the borough fund, is, by the 68th section, such as shall have been paid for

seven years before the 5th of June 1836. Such is the limit of the trust for this purpose declared by the act. Can it be consistent with such a declaration of trust, to appropriate to the ministers, not only what they had received for seven years before the 5th of June 1835, but the amount of income which had commenced within that period?

So, by the 139th section, all the advowsons and church property belonging to the corporation are directed to be sold, and the proceeds invested, and the income paid to the treasurer, as part of the borough fund. How inconsistent with the object and spirit of this clause is the appropriation of the corporate property, not to the purchase of advowsons, which might therefore be received back on the sale directed, but in adding to the provisions of the ministers of churches; which money so expended, although the value of the advowsons might be, in some degree, increased, would not, on the sale, be in any considerable degree restored or received back: and yet this was one of the grounds on which the transaction was defended at the bar. It was stated to be merely an application of one part of the property in augmentation of another part. Upon the second head, therefore, I am also of opinion, that the facts stated upon the information constitute a case which entitles the Attorney General, on behalf of the inhabitants, to demand the interference of this Court, unless its jurisdiction be taken away by the act.

The argument in support of the proposition, that the jurisdiction of this Court is taken away, rests entirely on the 97th section, which, in the cases there specified, authorizes and enables the new council to institute certain proceedings, and to submit the matter in dispute to a jury. And it is argued, that this clause gives a new right, and prescribes a remedy; that the right exists only in the remedy; and that no other course of proceeding but that prescribed may be resorted to. This may be true, as to transactions between the 5th of June and the 9th of September, when the act passed, because, at that time, there was no trust; but if it be true, as seems universally admitted, that, from the passing of the act, a trust of some sort existed, such trust must have all its legal consequences, and the *cestuis que trust* are

therefore entitled to all their legal remedies.

Suppose the new council had, under this clause, the power of bringing the case in question before the jury, it would be a new remedy. But the right cannot be said to consist in the remedy, inasmuch as the creation of the trust itself subjects the property to all the remedies applicable to the trust. And if this 97th section had not been in the act at all, the jurisdiction of the Court could not have been disputed, which proves the right does not consist only in the remedy, but that the remedy, if applicable to the case at all, is afforded as an additional means of enforcing the right. The jurisdiction of this Court could not be taken away, by another jurisdiction having cognizance given to it in the same matter. The case of *Beckford v. Hood* was well cited in support of this argument. Besides, in this case, the remedy is not given to the same person; and the argument is, that the summary remedy given to the council is to deprive the public, and therefore the Attorney General on their behalf, of the right of applying to this Court for its ordinary interposition in cases of breaches of trust.

On this third point, therefore, I am also of opinion, that the jurisdiction of this Court attaches upon the property in question, the moment it becomes trust property; and that there is nothing in the act to deprive the Court of its jurisdiction.

Then it was said, assuming the property is subject to a public trust, and that the Court has jurisdiction, there is not, upon the face of the supplemental information, such a case stated as makes it proper for the Court to interfere.

It has been said, that the corporate property became affected by a trust to some extent only, that the trust was not intended, under all circumstances whatever, to prevent the old governing body from alienating or appropriating the property, the income of which, if the property was not alienated or appropriated, would have to form part of the borough fund; and that they were not precluded from the fair application of the corporate property for the benefit of the inhabitants; and that it did not appear the appropriation in question was not an application of that description.

I cannot adopt this construction of the act, or follow this reasoning. The trusts, if created and declared by the act, are distinctly specified; and if so, it is contrary to the very nature of a trust, that any right should exist, unless specifically given for the parties who are the depositories of that trust, to defeat the trust. That would be the rule by which the controul of the Court would be regulated, and no other rule or limit can be adopted. If the old governing body had the right of alienating or appropriating property which would otherwise become subject to the trust, why may they not so alienate or appropriate the whole? If they might, at their discretion, reduce the trust, why may they not also destroy it? That the new governing body could not so deal with the trust property, is admitted; and yet it is supposed that the act intended that the old governing body, of which it had shewn so much jealousy, should have a power which is denied to the new governing body, although a body of its own creation.

In the hands of the new council, the capital was to be inalienable, and the whole income subject to a certain public trust; but, until such council could be appointed, the capital necessarily remained in the possession of the old governing body. Could it have been intended, that during the interval, the old governing body should have the right to alienate the capital, and thereby defeat the trust of the future corporation? Were they not trustees during the interval of the trusts declared by the act? If all the income of a specified character be by any will or deed directed, after a certain day or a certain event, to be applied to certain trusts, whether of a public or private nature, would not this Court protect that capital in whosoever hands it might be vested, whatever might become of the intermediate interest? The creation of the future trust, of itself restrains the exercise of any former power inconsistent with the security of the fund or the performing of the trust, unless the act itself permits the exercise of it.

Well, then, it is said, the 97th section impliedly does so, and assumes that the old governing body may sell or appropriate for a full and valuable consideration. This clause has unfortunately mixed up in one enactment two periods, the circumstances

of which are essentially different, namely, the period between the 5th of June and the passing of the act, during which, the power of the old governing body was absolute, and required therefore an enactment to controul any abuse of it in the contemplation of the act, and the period from the passing of the act until the election of the council and the appointment of the treasurer, during which, the trustees being created, no such absolute power existed, but a summary remedy against any improper act was desirable.

But it is sufficient for the purpose of my present consideration, to observe that the transaction stated in this information is, if within the remedy provided by the clause at all, not one intended to be protected by it, inasmuch as it cannot be said, according to the facts stated, to be an appropriation for a full consideration; and, if that clause gave the old governing body the power of alienation or appropriation after the act passed, such power must be limited to the cases where the full value has been received in the nature of money or property, and leaving the same amount applicable to the purposes of the trust.

The saying that the old governing body was not precluded from a fair application of the corporate property for the benefit of the inhabitants, and that it did not appear that the appropriation in question was not an appropriation of that description, appears to me to be the same proposition in other terms. If they were bound by the trust, they had no right to exercise that discretion; and, as I have before observed, such discretion, according to the act, applied only to the surplus after all the specified trusts were provided for, and was given to the new council only; and that it was not in any case to apply to any part of the capital of the corporate property, but to the surplus of the annual income only, after providing for all the specified purposes.

Another ground on which it is said this Court ought not to exercise its jurisdiction, is the remedy given by the 97th section to the new council to controul the acts of the old governing body, and the power, given to the Crown by an order in council, to order that such acts shall not be called in question under the provisions of this act. This proposition assumes, that the case

stated in the information is within the 97th section, and admitting that the jurisdiction of this Court is not taken away by the provision of that section, it proceeds on the ground that the remedy provided by that section ought to have been resorted to.

To this, it appears to me a sufficient answer, that the party who alone could exercise that power given by this section, and the party filing this information, are not the same; and I see no principle on which I could deny to any one the right of suing, to which he would otherwise have been entitled, because another party, over whom he has no controul, declines to follow a mode of proceeding open to him alone, which I may think preferable. And I must observe the power of the King in council, to protect the acts of the old governing body from being questioned, is confined in terms to their being called in question under the provisions of this act. It not only does not protect them from being called in question in any other manner, but the words, "under the provisions of this act," twice repeated, lead strongly to the conclusion that they were introduced for the purpose of guarding against any inference that any other proceedings were to be prevented by the order in council. The order in council is not to give validity to the act complained of, but only to protect it from being called in question by the summary process given by the same section. I quite agree with the Master of the Rolls, that this section does not take away the jurisdiction of this court. But I cannot think the giving that summary remedy to another body, which refuses to exercise it, ought to induce this Court to refuse to exercise its own jurisdiction. I say, to a body which refuses to exercise it, because such is the statement in the information, which I take to be true. The charge is, the new council have been advised, and admit, that the appropriation is invalid, and that they are desirous that the 105,000*l.* should be repaid by the trustees thereof, and that they have applied to them to repay the same, but refuse to take any further steps to procure the repayment thereof, without the sanction and direction of this Court.

It is said, the fair inference from the language of this charge is, that the town council approve of the appropriation. I

cannot so understand it, nor do I feel at liberty on a demurrer to assume that such is the case, against the plain language of the charge.

But supposing it were so, and were so charged, I cannot think that such an opinion or such conduct of the town council would deprive the Attorney General of the right to file this information according to the facts stated in it. If there be a clear surplus of the borough fund constituted as it is by the act, of the income only of the corporate property, an appropriation of such surplus for the purposes intended to be effected by the transaction in question, may be the most beneficial application of it for the inhabitants, and therefore the most proper to be adopted: but such is not the case stated in this information; and, beyond the power of applying such surplus, the town council itself has no power or discretion given. This approbation therefore, if given, as it is alleged, cannot sanction the transaction as it is stated in the information.

I have considered this case with the greatest care and attention. The amount of property, and the opinion expressed by the Master of the Rolls, on those points of the case which led to his decision, (although he agrees with me as to the most important points,) demanded it from me. I purposely avoid giving any opinion on the transaction beyond the statement on the supplemental information; but, upon that statement, and with reference to the provisions of the act, I cannot come to the conclusion, that this Court ought to refuse to entertain its ordinary jurisdiction; and, I am therefore of opinion, that the demurrer ought to be overruled.

Before the Lord Chancellor, a discussion arose as to the right to begin, and his Lordship decided that the appellants were entitled to begin.

M.R. }
Nov. 4, 11. } KAMPF v. JONES.

Will—Construction—Specific Legacy—Appointment.

A widow having a power of appointment over certain funds in favour of her children, by her will bequeathed to three of them, A, B, and C, pecuniary legacies, and declared

these to be the only benefit she intended them to receive under her will, or any appointment exercised thereby; and she afterwards appointed the fund, subject to the power, to her other children:—Held, on a deficiency of general assets, that the gift to A, B, and C, did not operate on the funds subject to the power.

*Funded property was settled to the separate use of a wife for life, with remainder to the children, as the wife should appoint; and as to the other moiety, for such children as the husband should appoint; and there was a power for raising 3,000*l.* for the husband and wife, or survivor. The husband did not execute his power, and, after his death, the wife directed the 3,000*l.* to be raised for her benefit:—Held, that it was raiseable out of the whole fund, and not out of the moiety over which the wife had a power of appointment amongst her children.*

*A testatrix, after giving certain legacies, as to 1,800*l.* consols, and 800*l.* long annuities, and all monies to which she had the power of appointment, under a deed of 1815, and all the residue of her personal estate, bequeathed and appointed the same to trustees upon certain trusts:—Held, that the gift of the consols and long annuities was specific.*

One having a power of appointing a fund amongst her children or remote issue, appointed a sum to one of her children absolutely, and then attempted to limit it over to the children of such child. The latter being held too remote, the absolute gift to the child in the first instance was held effectual.

By an indenture dated in December 1815, certain Carnatic stock, and 5*l.* per cents, were vested in trustees upon certain trusts, (so far as it is material to state them,) for Mrs. Kampf, for life, with remainder to her children, or their issue born in her lifetime, in such proportions, and subject to such conditions as she should appoint; and in default of appointment, or in case of an incomplete appointment, in trust for the children equally.

By a settlement dated in November 1817, certain other funds were settled upon trust for Mrs. Kampf, for life, and after her death, as to one moiety, "in trust for all and every, or such one or more exclusively of the other or others of the children or remote issue" of Mr. and

Mrs. Kampf, and subject to such conditions, with such restrictions, and generally in such manner as Mrs. Kampf should appoint; and as to the other moiety after the decease of Mrs. Kampf, in trust for Mr. Kampf, for life, with remainder to the children as he should appoint, and in default of such appointment, in trust for all the children equally. The settlement contained the following proviso:—"That, notwithstanding the trust thereinbefore expressed, or contained for the benefit of the said Thomas W. Kampf and Henrietta his wife, and their children and remote issue, it should be lawful for the trustees, at the request, in writing, of the said Thomas W. Kampf and Henrietta his wife, during their joint lives, or after the decease of either of them, then at the request, in writing, of the survivor, to levy and raise, by, from and out of the said trust monies, stocks, funds, and securities, any sum or sums of money not exceeding in the whole the sum of 3,000*l.*, and to pay the same to the said Thomas W. Kampf and Henrietta his wife during the joint lives, or after the decease of either of them, to pay the same to the survivor." Mr. Kampf died in 1829 without having executed any appointment, and Mrs. Kampf, after his decease, by letter, dated the 22nd of December 1832, directed the trustees to raise the sum of 3,000*l.*, and pay the same to her, but which had not been done at the time of her death.

By her will, dated the 22nd of December 1832, Mrs. Kampf gave and bequeathed unto her son John Henry Kampf, the sum of 1,000*l.* sterling, which she considered would, together with the 50*l.* given to him by his father, be equal to the benefit to be received by his said sister Henrietta, under or by virtue of the wills respectively, both of his said father and herself; she gave and bequeathed to her daughter Henrietta Kampf, the sum of 500*l.* sterling; the above legacies of 1,000*l.* to her son John, and of 500*l.* to her said daughter Henrietta, being the only benefit intended them to receive under her will, or any appointment exercised or intended to be exercised thereby; and the said testatrix directed that the legacies of 50*l.* each to her said trustees and executors, might be paid to or retained by them respectively, with all convenient speed after her death, and that

the said legacies to her said son and daughter might be paid to them at the end of twelve calendar months after her decease; and she gave and bequeathed unto her trustees and executors the sum of 1,500*l.* sterling, upon certain trusts for Mary Ann Kampf and her children.

The said testatrix, in exercise of the power contained in the deed of 1817, then directed and appointed that one moiety of the funds, then subject to the trusts of that settlement, and which should remain, after raising thereout the sum of 3,000*l.* therein-after mentioned, should go and be divided unto, between, and amongst her five remaining children, Henry B. Kampf, William B. Kampf, Edward T. Kampf, Charles F. Kampf, and Emily Frances Kampf, in equal shares; and she directed that the share of Emily Frances should be considered a vested interest in her, upon her attaining the age of twenty-one years, or day of marriage, which should first happen, so that the said marriage should be with the previous consent in writing, of the said trustees or trustee for the time being of her said will; but she directed, that the said share of her said daughter Emily Frances should be vested in the names of her said trustees jointly with her said daughter, upon her attaining the age of twenty-one years, or on the day of her marriage with such consent, which should first happen, and that the same should be held by the said trustees, upon trust, during the life of her said daughter Emily Frances, to pay to or permit her to receive the dividends, interest, and annual produce thereof, for her separate use; and after the decease of her said daughter Emily Frances, upon trust to pay and transfer the principal trust funds in which her said share should be invested unto and amongst the issue of her said daughter, if any, and if more than one child, share and share alike; and if she should die without issue, then unto and amongst the next-of-kin of her said daughter, at the time of her decease; but, nevertheless, the said testatrix directed, that at the desire of her said daughter, upon her attaining her age of twenty-one years, or being married with such consent, she should be entitled to receive the sum of 500*l.*, part of the said principal money, for her own absolute use. And the testatrix directed that her four

sons and daughter, last named, should be entitled to benefit of survivorship amongst them, in the event of the death of any one or more of her said sons under the age of twenty-one years, or of her said daughter Emily Frances, under that age, or without being or having been married with such consent as aforesaid. And the said testatrix gave and directed and appointed all that the sum of 3,000*l.*, by the said indenture of settlement authorized to be raised, upon the same trusts; and as to all those two sums of 1,800*l.*, 3*l.* per cent consolidated bank annuities, and 200*l.* long annuities, then respectively standing in her name in the books at the Bank of England, and also as to all and every the monies, stocks, funds, and securities for money of or to which she, the said testatrix, had power of appointment under or by virtue of the indenture of the 28th of December 1815, and all the residue of her personal estate, she, the said testatrix, gave, bequeathed, directed, and appointed the same unto her said trustees, upon trust, to collect, get in, and receive all debts and sums of money that might be due to her at the time of her death, and at the end of three calendar months next after her decease, to sell and dispose of, and convert into ready money, all her household goods and furniture, plate, linen, and china, and all such other parts of her said residuary estate and effects in their nature saleable, and to invest the monies, and to stand possessed of the said consolidated bank annuities, long annuities, monies, securities for money, and her said residuary personal estate, and the stocks, funds, and securities upon which the same should be invested, upon the same trusts as thereinbefore mentioned of the moiety thereinbefore by her appointed of and in the trust monies, funds, and securities, estates, and premises comprised in, or therein subject to the said indenture of settlement of the 17th of November 1817, or as near thereto as might be.

The testatrix died in March 1833; and at her death, her daughter Emily was an infant, and unmarried, and had no child at the time. The general assets of the testatrix were insufficient to pay her debts and legacies.

There were four questions discussed on these instruments: first, whether the sum of 3,000*l.*, which Mrs. Kampf directed to

be raised out of the funds comprised in the settlement of 1817, ought to be raised out of the whole funds, or out of that moiety only over which she had a separate power of appointment in favour of her children. Secondly, whether the legacies of 1,000*l.*, 600*l.*, and 1,500*l.*, ought to be paid out of the general estate of the testatrix, or out of the funds over which Mrs. Kampf had the power of appointment; it being contended, either that these bequests really amounted, by implication, to an exercise of the power of appointment, or that the appointment to the other children exclusively ought, at least, to be construed as conditional on these legacies being first satisfied. Thirdly, whether the bequests of the sums of 1,800*l.* consols., and 200*l.* long annuities, were to be considered as specific or general legacies. And fourthly, whether the interests appointed to the children of Emily, which it was considered were too remote, belonged to her, or were to be treated as passing to the other children of the testatrix, in consequence of the default of appointment; it being contended in her behalf, on the authority of *Carver v. Bowles* (1), that the fund being well appointed to her in the first instance, had not been cut down by the subsequent ineffectual gift to her children; and that consequently, she was absolutely entitled to that portion of the fund.

Mr. Kindersley and *Mr. Whitmarsh* for the plaintiff.

Mr. Torriano for Emily F. Kampf.

Mr. Tinney for Mary Ann Kampf.

Mr. Pemberton, and *Mr. Girdlestone*, for Mrs. Fisher, one of the daughters of the testatrix.

Mr. Spence and *Mr. Cooper*, for trustees.

Nov. 11.—**LORD LANGDALE**—[after stating the case].—As to the first question, it has been ingeniously argued by Mr. Pemberton, that the 3,000*l.*, which was so directed to be raised, should not be raised out of the whole fund, but out of that moiety which Mrs. Kampf had the power of appointing separately for her children. And I do not think it unlikely, that that construction would meet the intention of the parties to the settlement; but the

(1) 2 *Rum. & Myl.* 301; *s.c.* 9 *Law J. Rep. Chanc.* 91.

proviso appears to me to be so expressed as to exclude it. I think, if the 3,000*l.* were raised by the joint request of the husband and wife, or at the separate request of the survivor, it must be considered as taking it wholly out of the trust fund; and after its reduction, the remainder must be considered as the whole, subject to the trusts of the settlement; and therefore, it is only a moiety of that remainder which would ultimately vest in the children in default of Mr. Kampf's appointment.

On the second question, I confess, on full consideration of the words, I cannot, on any safe grounds, come to the conclusion contended for by the defendants. The testatrix has said, that this is "the only benefit she intended for them." By the same will by which she was disposing of her general estate, she was also exercising the power of appointment; and in the last clause of the will she had mixed up the residue of her estate, with the subject of the appointment comprised in one of the settlements under which the power was to be exercised; and she takes this opportunity of declaring, that such legacies which are, in the form and manner of them, exclusively pecuniary legacies, are all she intends them to receive by this her will, or any appointment or power of appointment exercised or intended to be exercised thereby—which means, that she is giving these out of her general estate, and does not mean to give them anything by any other means. These are to be considered only as general legacies; and, *a fortiori*, this seems to me to be the proper conclusion with respect to the 1,500*l.* given to Mary Ann Kampf.

The next question which has been raised here, is whether the sums of 1,800*l.* consolidated bank annuities, and 200*l.* long annuities, are to be considered as specific legacies or general legacies.—[His Lordship read the terms of gift.]

Now, in the first place, supposing the testatrix had those two sums of 1,800*l.* 3*l.* per cent. consolidated bank annuities, and 200*l.* long annuities, the description here is such as to make it specific—it separates this portion of her property from every other portion of her property; and, as far as the description is here contained, these would be specific legacies; and I do not think the words contained in

the subsequent part of the will alter the effect which is produced by the specific descriptions contained in the former part of the will; and therefore, I think, in the administration of this estate, these sums must be treated as specific legacies.

Another question was, whether the interests appointed to the children of Emily belonged to her, or are to be treated as passing to the children in default of appointment.—[His Lordship stated the gift to Emily.] Here certainly is a full and complete appointment.

Now, the power was conferred in terms to enable the donee to limit the interests, and it was to be given with such restrictions as she should think fit. There seems to be, in the clause which I have read, nothing contradictory or excessive in the execution of that power. But then the testatrix proceeds—[His Lordship read the gift over to the children].

Now, I think that, upon the authority of the case of *Carver v. Bowles*, this is an absolute appointment for the benefit of this lady, subject only to such restriction within the limits of the power, as are afterwards properly imposed on her; and the difference between this case and the case of *Carver v. Bowles*, which strikes one at first, is, that in the case of *Carver v. Bowles* the gift was contingent on whether he could do what he was about to do: he says, "so far as I legally can or may." Now, I think, though those words are not contained in the clause in this will, yet the effect must necessarily be the same. She had used very nearly the same words, which were considered to be giving an absolute vested interest to the daughter. She then attempted to limit—she made limitations which, to a certain extent, were quite within her power, but she has made others which were beyond the limits of her power. That, so far, was giving a benefit to a certain extent, but she attempted to take it away in a manner the power did not authorize. Therefore, I think, that if this lady were to attain the age of twenty-one, then it would be for her benefit, subject to the limitations and the restrictions which are imposed on her during her life. The way to provide for that (the fund being in court) would be, to carry it to her account, with liberty to apply.

L.C. }
Dec. 15, 16, 20. } GREEN v. WESTON.

*Bankrupt Act—Unclaimed Dividend—
Official Assignee.*

An official assignee only, was appointed under an old commission:—Held, that he had a sufficient title, without making any creditor a party, to maintain a suit for the recovery of part of the bankrupt's estate.

Dividends ordered to be paid, until actually paid over to the several creditors, form part of the bankrupt's estate.

The assignee under an old commission, at the time of his death, in 1818, had monies in his hands, consisting of dividends declared, but unclaimed:—Held, that the amount was recoverable from his representatives, by the assignee subsequently appointed, and that it was not a valid objection to the frame of the suit, that none of the particular creditors had been made parties thereto.

The facts of this case, so far as they are material to the points decided, were as follows:—In 1796, a commission of bankrupt issued against Menzies Baillie; and William Weston the elder, and two other persons, were appointed assignees, and the estate of the bankrupt was duly conveyed to them, upon the usual trusts, for the benefit of the creditors. Dividends were declared, and in 1818, William Weston, who was the surviving assignee, rendered an account, by which it appeared, that the unclaimed dividends in his hands, exclusive of other monies belonging to the estate, amounted to 916*l*.

William Weston the elder died in 1818, and his son, William Weston the younger, was chosen assignee. In 1821, the commission was renewed, and in the same year, William Weston the son rendered an account, shewing a large balance of money belonging to the bankrupt's estate in his hands, and a further dividend was declared. William Weston the son died in 1824, and in 1834, the plaintiff was appointed official assignee of the bankrupt, but no creditors' assignee was appointed. In the same year, the official assignee, as sole plaintiff, filed this bill against the persons representing the estate of William Weston the elder and William Weston the younger, claiming payment of the 916*l*., and other

monies. The judgment rested principally on the claim for the 916*l*., the amount of unclaimed dividends in the hands of William Weston the elder. On behalf of the defendants, it was contended, that the official assignee, possessing no beneficial interest in the subject of the suit, had no right or title to institute the suit;—that the dividends belonged to the several creditors, who had made no claim for them; that previous to the 49 Geo. 3. c. 121, each creditor was entitled to bring his action for his dividend; and that after the 6 Geo. 4. c. 16. s. 111, they might have obtained payment on petition; that the latter act, which by the 110th section, gave authority to the Lord Chancellor to direct the division of the unclaimed dividends amongst the other creditors, was not retrospective in its operation, and did not, therefore, apply to the present case;—that besides this, the 5 & 6 Will. 4. c. 29. s. 5, &c. repealed the 110th section of the 6 Geo. 4. c. 16. It was also objected, that the Attorney General and the creditors themselves ought to be parties to the suit.

The Solicitor General and Mr. J. Russell, for the plaintiff.

Mr. Wigram, Mr. Bethell, Mr. Whitmarsh, Mr. Jemmett, and Mr. G. Turner, for the several defendants.

The following cases were relied on:—

Ex parte Wackerbath, 2 Glyn & J. 155.

Ex parte Grant, 1 Mont. & M. 77.

Maggs v. Hunt, 4 Bing. 212; s. c. 5 Law J. Rep. C.P. 130.

Wombwell v. Laver, 2 Sim. 360.

Key v. Cooke, 2 M. & P. 720; s. c. 7 Law J. Rep. C.P. 153.

Kay v. Goodwin, 6 Bing. 576; s. c. 8 Law J. Rep. C.P. 212.

Fox v. Mahoney, 2 Cr. & Jer. 325; s. c. 1 Law J. Rep. (N.S.) Exch. 106.

Carew v. Edwards, 4 B. & Ad. 351.

Ex parte Sammon, Mont. 253.

Ex parte Philip, 1 M. & Ayr. 674; s. c. 3 Law J. Rep. (N.S.) Bankr. 123.

THE LORD CHANCELLOR.—The question in this case, so far as regards the estate of William Weston the elder, is, whether the plaintiff, as official assignee, has any such estate and interest in the sum of 916*l*. 11*s*. 5*d*., which, by an account rendered in 1818, appears to have been the amount of divi-

dends not called for, then in the hands of William Weston the elder, the then assignee of the bankrupt's estate, as to entitle him to file a bill for an account of that sum, against the personal representative of the assignee.

It must be assumed, for the purpose of trying this question, that this sum was never paid over to the creditors; no such payment has been proved; but it is said, that the plaintiff, as official assignee of the estate, is not entitled by a bill to inquire into the application of that sum, or to recover the amount against the estate of the assignee. It is first to be considered, what is the estate and interest of the official assignee in the property of the bankrupt.

By the 1 & 2 Will. 4. c. 56. s. 22, it is provided, that all the personal estate of a bankrupt shall be paid to, and received by, the official assignee; and by the 25th section, all estate vested in a deceased assignee, by the appointment of a new assignee, vests in such new assignee without any deed or assignment; so that, if the property in question be part of the bankrupt's estate, there can be no doubt of the plaintiff's estate and interest in such property, so as to entitle him to sue for it. That it was part of the bankrupt's estate is not disputed; and the question is, whether it ceased to be so by the effect of the order for dividend, which, in this case, was made in the year 1818. By such order it is contended, that William Weston, the assignee, ceased to hold the sum of 916*l.*, in his character of assignee, and became trustee of it, for the several creditors whose debts had been proved, that is to say, for all the creditors. Now, what was the real effect and operation of the order for dividend? The assignee from the commencement held as trustee for all the bankrupt's creditors; but, until the debts had been ascertained, it was uncertain who were the parties interested in the trust. When, however, by the proof of debts, the parties interested were supposed to be ascertained, an order was made for dividing what might be in the hands of the assignee, amongst the creditors who had so proved. The property to be divided was the estate of the bankrupt, and it does not appear to be very obvious how such property could cease to be the estate of the bankrupt, because the state of the proceed-

ings enabled the commissioners to ascertain the creditors among whom it was to be divided. The trust remained as before, a trust for all the creditors, although the individuals constituting that class were ascertained. An order for a dividend is not an appropriation of any particular part of the bankrupt's estate to any particular creditors; but an order to pay a proportion of all the debts out of the bankrupt's estate, there appearing to be assets for that purpose. If an executor be ordered, by his testator, to pay a debt, or a legacy, the assets out of which such payment is to be made, do not cease to be part of the estate of the testator, until actual payment of the sum thus ordered to be paid. That an action of assumpsit would lie for a dividend, which was first decided in *Brown v. Bullen* (1), cannot disprove this proposition; for it is clear, an order for such a purpose might have been made under the jurisdiction in bankruptcy—*Ex parte White* (2), which could not have been done, if, as is contended, the assignee, *quoad* the sum out of which the dividend was to be paid, was no longer under the jurisdiction of bankruptcy. It is, therefore, not material to consider, whether the right to recover a dividend in an action of assumpsit, established in 1780, and taken away in 1809 by the 49 Geo. 3. c. 121, was founded on a true consideration of the situation of the parties. It is also clear, that after a dividend declared, a debt might be expunged; and on that being done, the amount of the dividend on such debt formed part of the general estate, not by any repayment, or restoration of a divested title, but as constituting part of the estate from which it had never been separated. What would be the consequence of the doctrine contended for? Why, that the moment a dividend is declared, which might be of the whole estate, the assignee may appropriate all the money to his own use, for which there could be no remedy in bankruptcy; and none but by the individual claims of the particular creditor; and it being contended, that sums set apart to answer claims, are in the same situation as dividends declared, the same result would follow as to these sums,

(1) Doug. 407.

(2) 1 Atk. 90.

although the creditors tendering claims might not afterwards be in a situation to maintain them.

In the 5 Geo. 2. c. 30. s. 32, after reciting the evils that arise from money remaining in the hands of assignees, whereby they delay the dividing thereof, it is provided, that the creditors shall direct in what manner the monies arising from the bankrupt's estate shall be paid in, and remain until the same shall be divided among the creditors. By section 33, after directing the mode of making the order for a dividend, it directs, that the assignee shall forthwith make dividend and distribution accordingly, and shall take receipts in a book to be kept for that purpose, from each creditor, which order and receipt is to be a full and effectual discharge to such assignee, for so much as he shall fairly pay, pursuant to such order. Now, on what account is this receipt to be a discharge? It can only be meant to be a discharge in the account to be rendered under the jurisdiction in bankruptcy. By Lord Loughborough's order of the 8th of March 1794, after reciting that the creditors did not always give directions in pursuance of the above act, it is directed, that in such cases the assignee shall pay all monies amounting to 100*l.* into the bank, there to remain until the same shall be divided among the creditors; and all assignees in future should pay the same conformably to the direction of the commissioners, or to their order. By the 49 Geo. 3. c. 121. s. 3, the commissioners are directed, in default of any direction by the creditors, to direct how, with whom, and when, the bankrupt's estate shall be paid in, and remain until the same shall be divided among the creditors. By section 7, the commissioners are authorized to direct the investment in Exchequer bills, of all monies paid in for that purpose, for the purpose of being divided among the creditors, or of money retained to answer claims or dividends ordered to be retained. All these provisions consider the whole of the bankrupt's estate received by the assignees, until actually divided and paid to the creditors, as subject to the jurisdiction in bankruptcy, and such was the state of the law in June 1818, when Weston the elder, and in 1824, when Weston the younger, died, each at the time of their deaths having

considerable sums in their hands belonging to the bankrupt's estate. Of so much of such monies as had not been, what is called, appropriated to the payment of dividends, it is not disputed that an account must be taken. It does not appear that any distinction was made in any of the legislative provisions, which I have hitherto referred to, between any part of the bankrupt's estate, until actual payment of the dividends. The subsequent enactments are still more specific in shewing, that the sums left in the hands of the assignee, for the purpose of paying the dividends, have always been considered as subject to the jurisdiction in bankruptcy, and subject to be accounted for as such. By the 6 Geo. 4. c. 16. s. 110, assignees are to account for all unclaimed dividends, which are to be invested under the direction of the Lord Chancellor, and if not claimed within three years, are to be divided among the creditors.

It was urged, that this act was not retrospective, by which it must have been intended, that it did not operate on the then existing commission; but the enactment is, that if any assignee under any commissioner shall not within six months after the act comes into operation, or two months after the notice of any declaration of dividends, which must mean within six months after the act comes into operation, as to all cases in which orders for dividends had been then made, and a longer period in all cases in which orders for dividends should afterwards be made, pay, &c. At the date of this act, in 1825, both the Westons were dead; but its provisions are important, as shewing, from the 5 Geo. 2. in the year 1732, a regular series of legislative recognitions of the liability of assignees to account, under the jurisdiction in bankruptcy, for monies, out of which they have been ordered to pay dividends, and of such monies being part of the bankrupt's estate until actual payment to the creditors. But, whether this particular provision be retrospective or not, does not appear to me of any importance, because the provision is repeated in the 5 & 6 Will. 4. c. 29; by the 6th and 7th sections, each clearly operating on then existing commissions. The 7th section specifies, "any commission or fiat now issued, or hereafter to be issued." All un-

claimed dividends are to be paid into the bank, and any assignee who shall make default, is to be charged in account with the bankrupt's estate, with interest on the amount. These provisions do not appear to me materially to affect the present question, as they only direct the application of a fund, which has as at all times been considered as part of the bankrupt's estate, and which has been so treated by legislative enactment for upwards of a century; and if it be part of the bankrupt's estate, then beyond all doubt it vests in the assignee, and he is entitled to sue for it.

It appears to me, that the only thing which raises any doubt on the subject, are the cases deciding that an action would lie for a dividend, and the creditor neglecting to call for the dividend, is to bear the loss of the fund. That the creditor should be so treated is undoubtedly just, as it is his neglect which occasions the loss; but whether this be reconcilable or not, with the real position of the parties, or the state of the property, it cannot operate against the conclusion arising from the considerations which I have before observed upon, that until the dividends are actually paid, all the bankrupt's estate, which was received by the assignee, remains part of that estate.

I have been induced to enter thus fully into the consideration of this case, from the high respect which I feel for any suggestion coming from so eminent and learned a Judge as Lord Eldon. I must, however, observe, that what fell from him in *Ex parte Wackerbath* was wholly extrajudicial, and must be so considered, as he only mentioned the points to shew that he gave no opinion upon them. But, still, there is a sufficient indication of what was floating in his mind, to give great weight to those observations.

I have little doubt, if he had thought it necessary to give any judgment on these points, he would have given that consideration to them, which he always did to matters before him, and those doubts would have been removed. But be that as it may, after carefully considering these doubts, and all the views and bearings of the subject, which the facts of the case and the arguments at the bar have presented to my mind, I have no doubt of there being in the plaintiff a title to sue for the funds in

question, which will support the suit he has instituted; and that he is, therefore, entitled to a decree. The view I have taken of the nature and position of the funds in question, considering them as part of the bankrupt's estate, because not actually paid to creditors, makes it unnecessary for me to make any observation on points raised, as to the Attorney General being the proper authority to pursue the fund, and as to the necessity of the unpaid creditors being parties; the accounts of 1818 and 1821 shewing the amount of monies then in the hands of Weston the father and Weston the son, the inquiry will be, in what manner such sums have been retained, paid, applied, and disposed of.

M.R.

Nov. 15; }

Dec. 21. }

BARBER v. BARBER.

Will—Construction—Executors—Conversion.

A testator gave to A. an annuity for life, and directed an investment to be made for securing it, which, on the death of A, was to devolve on the testator's son and daughter. He afterwards gave half the residue to his son and daughter, and "desired that the property he had bequeathed to them" should be invested, and be subject to certain limitations over:—Held, on the whole will, that the fund provided for the annuity belonged to the testator's children absolutely, and was not subject to the limitations.

A testator, in certain events, which happened, gave a portion of the residue to A, B, C, and D, to be divided between them in equal proportions, and appointed them executors, to see that everything was duly executed and performed according to his will; he afterwards appointed two other persons as executors, in addition, to whom he gave legacies; D. having declined to prove the will,—Held, that he was not entitled to any part of the particular portion of the residue, but that the whole belonged to A, B, and C, who had proved.

Whether an unattested codicil can be called in aid to construe a gift of real estate devised by a will properly attested—quære.

Where a legacy of residue is given in such a way as to vest, but so as to be liable to

be divested on a given event; the interest in the meanwhile and until the divesting belongs to the legatee.

Devise of freeholds to be sold, and after payment of debts, the residue to be invested on certain trusts:—Held to be a conversion; so that on a lapse, the heir would take it as personalty.

John Mackintosh, the testator, by his will, duly attested by three witnesses, dated in 1817, desired that his estate, called Piggott's Manor Farm, situated in the parish of Aldenham, in the county of Herts, with the furniture, certain specified articles of personalty, and every other thing which might be in and upon the said premises, should be sold as soon after his decease as possible and convenient, and in such manner as might be productive of the greatest value. After the payment of all his just debts, which he desired might be done as soon as convenient, he gave and bequeathed unto Thomas Shears, an annuity of 50*l.* per annum, for life, and he directed an investment in the British National funds for securing the same; and he desired, that "at the decease of the said Thomas Shears, the said funded property should devolve to and become the property of his son John Mackintosh, and his daughter Eliza Jane Mackintosh." The testator then proceeded as follows:—"I give and bequeath unto my son John Mackintosh, my daughter Eliza Jane Mackintosh, Mary Ann Shears, and Martha Shears, the whole residue of my property of every description and kind, which may belong to me at the time of my decease, or that may devolve to me by right or otherwise, at any future time, to be divided betwixt them, in separate and equal portions, subject to the following directions"—the testator then directed the property which he had bequeathed to Mary Ann Shears and Martha Shears to be invested in trust for them for life, with remainder to their children, and proceeded: "I desire that the property I have bequeathed to my son John Mackintosh, and my daughter Eliza Jane Mackintosh, may be invested in the public funds of Great Britain, in separate accounts, in the names of trustees, appointed by my executors, and also the names of my son and daughter, and for the sole use and benefit

of my son and daughter. And it is also my will and desire, that the interest or dividends arising from the said funded property for my son John, be applied for his maintenance and education, &c., until he arrives at the age of twenty-one years, and after that period, he shall have the power of receiving such interest or dividends himself, and dispose of it as he may think proper, until he arrives at the age of twenty-five; then the whole of the property I have bequeathed to him shall be at his own disposal, without controul. It is my will and desire, that half the property which I last bequeathed to my daughter Eliza Jane, may be invested in the public funds, in the name of herself and trustee, appointed by my executors for that purpose, for her maintenance, education, use, and benefit, during her life, and for her child or children, if any, living at the time of her decease; but if there is no issue living at the time of her decease, then the said property shall devolve to my executors herein named; but if there is issue of my son John living, then it shall devolve to that issue, and the other half of the property bequeathed to her shall be invested in the public funds, for her sole use and benefit, until she arrives at the age of twenty-one years, then the said property shall be at her own disposal, without controul. It is my will and intention, that my son John Mackintosh may dispose of his property by will, after he has arrived at the age of twenty-one years; but should he die before he arrives at that age, then the said property shall devolve to my daughter Eliza Jane, if she is living; and should Eliza Jane die before she is twenty-one years of age, then the property bequeathed to her shall devolve to my son John; but should both die before they arrive at twenty-one years of age, then the property bequeathed to them shall devolve to and become the property of Mr. Joseph Barber, America-square, Mr. John Stapp, of Snow-hill, Mr. Frederick Grigg, of the Old South Sea House, and Mr. George Capper, of Crosby-square, in London, to be divided betwixt them in equal proportions, and to their heirs for ever, which last-mentioned four persons I also appoint as my executors, to see that everything is duly executed and performed according to my will and desire

herein; I also appoint Mr. Francis Garratt and Mr. John Garratt, as executors in addition to the above persons, for which I request those two friends will accept of 50*l.* each, as a testimony of my gratitude. I also request that Messrs. Francis and John Garratt will act as guardians, in conjunction with Mr. Capper, Mr. Barber, Mr. Grigg, and Mr. Stapp, for the care of the persons and property of my son John and Eliza Jane, and Mary Ann and Martha Shears. I give further unto my son John 1,000*l.*, *subject to the same restrictions* in every point as the property I have before bequeathed to him." The testator made an unattested codicil as follows:—"It must be understood, that it is my will and intention, that if either or more than one of my executors shall refuse to accept the trust, and act as executor, according to the directions given in my will, then I annul totally my bequest of my property to every such person as shall so refuse to take the trust upon himself."

After the testator's death, in 1818, Barber, Grigg, and Stapp, alone proved the will, Capper and the two other executors having declined. The sum of 3,888*l.* 6*s.* 8*d.*, 8*l.* per cents., was set apart to answer the annuity bequeathed to Thomas Shears. Both the testator's children, John Mackintosh and Eliza Jane Mackintosh, died under age, and without having been married, but both made wills, which operated on their personal estate; and Eliza Jane Mackintosh, who was the survivor, left no heir.

There were several questions in the cause; first, whether the fund provided for the annuity of 80*l.* belonged (subject to Thomas Shears's interest therein) to the two children absolutely, or was subject to the trusts declared of their share of the residue;—secondly, as to the construction of the residuary gift to Messrs. Barber, Stapp, Grigg, and Capper, and particularly whether Capper, who had declined to prove the will, was entitled to share in this bequest; and if not, whether the share to which he would have been entitled, if he had proved, belonged to the other three, or lapsed;—thirdly, whether the unattested codicil could be looked to, as far as regarded the gift of the real estate;—fourthly, whether the gift of 1,000*l.* to John Mackintosh, "subject to the same restrictions," included

the limitations over;—fifthly, whether the accumulation of the income which had arisen during the minority of the children, belonged to their representatives, or went over on their death with the capital;—and, sixthly, whether there had been a conversion of the real into personal estate, by the direction to sell, and as to the rights of the Crown thereto.

The following authorities were cited as to the second point:—

Owen v. Owen, 1 Ath. 494.
Cresswell v. Chealyn, 2 Eden. 123.
Knight v. Gould, 2 Myl. & K. 295.
Read v. Devaynes, 3 Bro. C.C. 95;
 s. c. 2 Cox, 286.
Harrison v. Rowley, 4 Ves. 212.
Figgott v. Green, 6 Sim. 72.
Stackpole v. Howell, 13 Ves. 417.
Dix v. Reed, 1 Sim. & Stu. 237.

As to the fourth point:—

Shanley v. Baker, 4 Ves. 732.
Grassick v. Drummond, 1 Sim. & Stu. 517.

As to the fifth point:—

Taylor v. Johnson, 2 P. Wms. 504.
Shey v. Barnes, 3 Mer. 335.
Nicholls v. Osborn, 2 P. Wms. 419.
Chaworth v. Hooper, 1 Bro. C.C. 82.

As to the sixth point:—

Phillips v. Phillips, 1 Myl. & K. 649;
 s. c. 1 Law J. Rep. (n.s.) Chanc. 214.
Roberts v. Walker, 1 Russ. & Myl. 752.
Cruse v. Barley, 3 P. Wms. 20.
Amphlett v. Parke, 2 Russ. & Myl. 221;
 s. c. 5 Law J. Rep. Chanc. 139, and
 9 *ibid.* 161.
Tullit v. Tullit, Amb. 370.

Mr. Kindersley, *Mr. Humphrey*, and *Mr. Elderton*, for the plaintiffs.

Mr. Wray, for Mr. Capper.

Mr. Blunt, for the Attorney General.

Mr. Pemberton, *Mr. Richards*, and *Mr. J. Romilly*, for the three executors who proved the will.

Mr. L. Lowndes, and *Mr. Girdlestone*, for Martha Shears and Mary Ann Shears.

THE MASTER OF THE ROLLS.—On that which I consider to be the main question

in this cause, whether the share of the estate which Mr. Capper would have taken if he had proved, has lapsed, and, therefore, belongs to the testator's next of kin, or whether it was comprised in the gift which was made to the residuary legatees, which belonged to them as executors, I shall take some time to consider my opinion; as to the rest, it does not appear to me I can, by any further application of time, come to a more decided conclusion than that which I have now formed.

Certainly, this will, as many others, shews the extreme hazard there is of a man, even of an acute and intelligent mind, undertaking to make a will, by which he limits his estate, in language which is not technical language. The plan of his will is evidently extremely simple: in the course of this will he has used on some occasions distinctly the words, "I give and bequeath," and on other occasions he has, as it seems, carefully avoided that expression, and used the word "devolve." All direct and immediate gifts appear to be expressed by the words, "I give and bequeath," and all gifts and limitations over, are expressed by the word "devolve." And it is material to observe this, in order that we may find the meaning of the testator in the different parts of his will. The testator, in a previous part of the will, directed, on the death of the annuitant, "the said funded property to devolve to and become the property of his son and daughter:" and then he has given the whole of his property to the four, subject to the following directions—*viz.*, &c.; and amongst those directions comes this, "after the sale of my property as before directed, I desire the property I have bequeathed to my son John Mackintosh, and my daughter Eliza Jane, may be invested"—and so on; that is to say, it is to be invested in the public funds, in the names of trustees appointed by the executors. Now, I certainly think that the testator did not mean to include in the property which he had bequeathed to his son John Mackintosh, the annuity, or the money producing that annuity, which he had given to Thomas Shears, and which money he had directed should devolve. I think it is not so from the words which he has used, and from the place where they occur in the will under

that *videlicet*, which contains the directions applicable to the whole residue of his property, after the previous payments had been made.

I think, therefore, that that money which was ordered to be invested and set apart to answer the annuity, is not included in the residue, which was subject to the directions after mentioned.

It appears to me, that the gift, which was made to four of the six executors, as residuary legatees, was made to each of them in the character of an executor; and I am of opinion, on the construction of this will, that as Mr. Capper never assumed the character of executor, he has never become entitled to any portion of the residuary estate, whether real or personal. I have come to this conclusion on the construction of the will without the aid of the codicil: the codicil, perhaps, I have not a right to call in aid, in respect of the real estate, though it must be considered with reference to the personal estate; but from the words which the testator has used in the codicil, one can hardly fail to see his desire there is to explain what he had said in the will. "It must be understood so and so." How must it be understood? "From my will: there is some ambiguity about it, and therefore I think it necessary to make an explanation." In this case, without the aid of the codicil, it appears to me, none of the persons I have mentioned, either the four residuary or the two pecuniary legatees, could be entitled to take anything without assuming the character of executor. On the other hand, it seems to me, further, not meaning to express my opinion on the result of that in one point of view, yet, in another, I think I may venture to express an opinion now,—that considering what this testator has done with the whole of his property, the direction to sell the whole, I think he has so far made a conversion of the whole estate into personal estate, that if there should be a lapse, although the heir would take that portion of the money which lapsed and formed part of the real estate, yet he would take it in the character of personal estate; and consequently it would belong to the legal personal representative of the heir, and not the heir of the heir; and therefore, not belonging to the heir of the heir, the At-

torney General can in this case have no claim to it.

There is another point, which seems to me to appear on the true construction of this will, that is, with respect to the interest. I apprehend it to be a clear rule, if a legacy, either a pecuniary legacy or a legacy of residue, or a portion of residue be given to any person in such a manner that it vests in that person at the death of the testator, though it be liable afterwards to be divested on a contingent event, that until the event happens, which determines and divests the legacy, the interest belongs to the legatee who had the vested interest in the meanwhile; and, I think, in this case it can scarcely be doubted that there was an absolute interest given to the legatee; and though it was afterwards subject to be divested, it did not deprive him of the income which arose from the property in the meanwhile. The gift is a part of the whole residue of his property to his son John: and the words which subsequently follow, and which I have already read, certainly appear to me in no way to alter the view which I have taken, that this was an absolute vested interest in them, though liable to be divested; on the contrary, they afford the strongest proof in corroboration of it. I think, therefore, the interest which accrued during the lives of those children, belonged to the children, and passed to their legal personal representative.

Dec. 21, 1837.—THE MASTER OF THE ROLLS.—The question reserved in this case was, whether a share of the residue of the testator's estate, given to a person appointed executor, who renounced probate of the will, lapsed for the benefit of the next-of-kin, or devolved on the executors, who proved the will. [His Lordship stated the will.] The will was proved by Messrs. Barber, Stapp, and Grigg; but Francis and John Garratt, and also Mr. Capper, declined to undertake the executorship, and consequently acquired no title to the gift made to them. The legacies of 50*l.* each given to the Messrs. Garratt, fell into the residue; and the question is, who is entitled to the share of residue, which would have devolved on Capper, if he had proved the will? On the one hand, it is argued,

that as the residue was given to four persons in their character of executors, it devolved to such of them as legally assumed the character and undertook the trust. On the other hand, it is argued, that the residue is not given to the class of executors, but to four individuals, as residuary legatees, in terms which import a tenancy in common; and although the appointment of the same persons as executors, defeated the gift to any one who did not undertake the character, yet the others are to be considered as entitled, each of them, to a fourth only; and consequently that the share intended for Mr. Capper lapsed and devolved to the next of kin of the testator. It has been determined, that if a distinct aliquot part of a residue be given to each executor, and one dies or neglects to prove the will, the share of the residue given to that one lapses, and does not go to the executors surviving, or proving the will; and also if the residue be given to the executors as a class, though in terms which import a tenancy in common among them, and one dies in the lifetime of the testator, the whole shall vest in the survivors who proved. But it is contended, that a gift to certain individuals in terms which import a tenancy in common, is, notwithstanding the subsequent appointment of the same persons to be executors, to have a different effect, and especially where, as in this case, the same individuals do not constitute the whole class of executors.

In the case of *Hunt v. Barclay*, which is shortly reported in a note to 1 *Atkyns*, 495, and in 1 *Equity Cases Abridged*, 243, the testatrix gave the residue of her personal estate to her brother and to her two sons-in-law, the defendants, to be equally divided between them, and made them executors, and one having died in the lifetime of the testatrix, the whole residue was decreed to the survivor. As this case was referred to and disapproved of by Lord Hardwicke in *Owen v. Owen*, it can scarcely be relied on, although, from the note in *Equity Cases Abridged*, it would seem to have been very carefully considered by Sir Joseph Jekyll.

The case of *Owen v. Owen* was referred to in the argument of the present case, as an authority for the next-of-kin, but the circumstances of that case are special, and

do not appear to me to afford a rule for cases of this nature, and I am not aware that, with the exception of the cases of *Hunt v. Barclay* and *Owen v. Owen*, any case of a gift to individuals as tenants in common, the same individuals being appointed executors, is reported. The case of *Cray v. Willis* (1) was a case of joint tenancy; and in *Frewin v. Relfe* (2), and *Knight v. Gould*, the gift was to the executors as a class, though in terms denoting a tenancy in common. But it appears to me difficult to distinguish the case of a gift to executors as tenants in common, from the case of a gift to certain persons afterwards appointed executors as tenants in common. Whenever a legacy is given to one individual, and the same individual is appointed executor, the gift of the legacy and the appointment of the executor are presumed to be connected, and the legatee must take *quod* executor, unless something be found in the will to shew that the testator meant otherwise; and if the gift of the legacy is held to be connected with the appointment of executor, the class of executors must also be held to have been contemplated when the gift was made; and, I think this will is not to be construed otherwise than it would have been, if the testator had given the residue to his executors as tenants in common, and then nominated four individuals as executors; and if that were so, the case would materially differ from *Knight v. Gould* only in the circumstance that two other persons, as well as the residuary legatees, were appointed executors. Though the six persons who were appointed executors would, if they had proved the will, have had a joint and legal authority, it is plain the testator made a great difference between them: four of them were made contingent residuary legatees; and it is stated, that they were appointed executors to see that everything was duly performed according to the testator's will and desire, expressed in his will; the other two are appointed executors in addition; the testator calls them his friends, and gives them pecuniary legacies of 50*l.* each, as a mark of his gratitude; and taking the whole will together, the executors, who

are made residuary legatees, appear to me to be so far distinguished from the others as to constitute a distinct class of themselves, and to be the class referred to in the former part of the will as "the executors herein named."

By "the executors herein named," I think he meant the executors herein named as residuary legatees. The case, however, appears to me to be attended with very considerable difficulty; but, under the circumstances, I do not consider the four persons named as each of them the legatee of a distinct fourth part of the residue, as, in the case of *Page v. Page* (3), each was the legatee of a sixth part; but I think the residue is given to a distinct class of the executors, and that it vests in such of the persons constituting that class, as have legally assumed the character, as tenants in common, and that the share which would have vested in Capper if he had proved, has vested in the residuary legatee executors who did prove the will.

V.C.
June 2. }
L.C. }
July 29. }

ATTORNEY GENERAL V.
NETHERCOAT.

Practice. — 13th New Order, 1831 —
Construction—Amendment.

Held by the Vice Chancellor, that on a motion to produce papers, &c., admitted by the answer of a defendant to be in his possession, the Court has authority to grant a special application for leave to amend, notwithstanding the 3 & 4 Will. 4. c. 94. s. 13, and the 13th New Order, 1831.

A negotiation for a compromise which had been pending, held to be a sufficient answer to a notice to dismiss for want of prosecution.

An information was filed against A. alone, and after he had answered, B. was made a defendant:—Held, that a further application for leave to amend, was, even as against B, a special application within the 13th order, and ought to be supported in the manner thereby required.

This information was filed against Nethercoat alone, on the 31st of October 1835,

(1) 2 P. Wms. 529.

(2) 2 Bro. C.C. 320.

(3) 2 P. Wms. 489.

who having by his answer discovered the names of his co-trustees, they were made parties by amendment, on the 13th of May 1836.

Samuel Marsh, one of these parties, filed his answer on the 2nd of August 1836, and from November following to March 1837, negotiations were pending for a compromise, which proved ineffectual.

On the 4th of May 1837, the relator gave notice of motion, that a defendant (not Marsh) might produce certain deeds, &c., admitted to be in his possession, and for leave to amend the information, the relators undertaking to amend within a month after they had obtained an inspection of the documents.

The defendant, Marsh, gave a cross notice of motion to dismiss the information for want of prosecution, and both motions came on together.

Mr. O. Anderson, for the first motion, contended, that on the motion to produce papers, all the circumstances enabling the Court to determine whether leave to amend ought to be given or not, necessarily came before the Court; and that, therefore, the Court had jurisdiction to grant leave to amend in the first instance, and that the point had been settled by the Master of the Rolls in the case of *Rees v. Edwards* (1).

Mr. Bunt and Mr. Koe, contra.—It was objected, that the application to amend ought to be made to the Master, and not to the Court, for the 3 & 4 Will. 4. c. 94. s. 13. expressly enacted, "that the Masters in ordinary should hear and determine all applications for time to plead, answer, or demur, and for leave to amend bills;" and the terms of the 25th order of 1833, were express, that all special applications for leave to amend bills should be heard and determined by the Master.

His Honour gave leave to amend within a month, after the relator had inspected the documents; but made no order on the cross motion.

Marsh appealed from the decision, and moved to discharge the Vice Chancellor's order.

(1) 1 Keen, 465; s. c. 6 Law J. Rep. (N.S.) Chanc. 151.

Mr. Wigram and Mr. Koe, for Marsh.

Mr. Spence and Mr. O. Anderson, contra.

—The case was decided on a point not raised before the Vice Chancellor, namely, that the bill having been once amended by adding parties, the motion to amend before the Vice Chancellor, being an application for a second amendment, ought to have been supported by an affidavit, that the draft of the intended amendments had been settled and signed by counsel, &c., as required by the 13th order, 1831.

It was contended on the part of the relators, that as against Marsh, the proposed amendment was a first amendment; but—

The Lord Chancellor considered the case within the 18th order, for if not, a plaintiff might evade that order by adding defendants; he, therefore, discharged the order, giving liberty to amend, but without prejudice to any application the relators might be advised to make (2).

V. C. } ATTORNEY GENERAL 2.
Nov. 22, 23, 24. } WILSON.

Municipal Corporation Act, 6 Will. 4. c. 76. Construction of—Breach of Trust—Demurrer.

Before leave had been obtained to bring in the *Municipal Corporation Act*, but after notice had been given in the House of Commons of the intention of government to introduce such a measure, a corporation passed a resolution, that a sum of stock belonging to them should be transferred to certain persons, "so as to vest in them, and to divest the corporation of all power and control over the same;" but no transfer was actually made till after the 5th of June, from which day alienations of corporate property without adequate consideration might be called in question under the act. In November, deeds were executed by the parties to whom the stock was transferred, declaring the purposes to which it was to be applied, and which were for the benefit of certain charitable institutions, and for the endowment or enlargement of churches within the borough:—Held, that the resolution above men-

(2) See *Evans v. Hughes*, 5 Sim. 666.

tioned did not divest the corporation of their interest in the stock; and a demurrer to an information and bill, praying that the transfer might be declared fraudulent, and that the parties concerned in it might personally make good the amount transferred, was overruled.

The 97th section of the above-mentioned act, does not take away the ordinary jurisdiction of the Court, where a breach of trust has been committed, affecting corporate property, but the remedy provided by that section is cumulative.

This was an information and bill. The relators and plaintiffs were the mayor, aldermen, and burgesses of the borough of Leeds. After setting forth the letters patent, by which the town of Leeds was originally created a borough, in the reign of Charles 2, the information alleged, that the corporation was, on the 30th of May 1835, entitled to a sum of 6,500*l.* 3*l.* per cent. bank annuities, standing in the names of Edward Markland, then deceased, Christopher Beckett, and John Wilson, as trustees for the corporation. It then contained an allegation respecting a sum of 500*l.*, secured to the corporation, or to trustees for them, on the tolls of the Leeds and Wakefield turnpike road; and stated, that these two sums formed the only property of the corporation, with the exception of some pews of trifling value, certain churches in Leeds, and a small balance of cash in the hands of the treasurer, amounting to about 360*l.*; that on the 30th of May 1835, a meeting of some of the members of the corporation was held, at which a resolution purporting to be a resolution of a court of the mayor, aldermen, and assistants, was passed, to the effect, that the two before-mentioned sums "should be absolutely transferred and alienated to John Wilson, William Beckett, and John Blayds, so as thereby to vest the same in those gentlemen, and divest the corporation of all power and controul over the same;" but that no actual transfer or assignment of either of these sums was then made; but that there was some understanding between Messrs. Wilson, Beckett & Blayds, and some of the members of the said corporation, that they were not to be entitled to the 6,500*l.* and 500*l.*, for their own benefit, but that

they should hold and dispose of those sums for such purposes as the corporation, or the court of the mayor, aldermen, and assistants should thereafter direct; and that no resolution was passed at the meeting, held on the 30th of May 1835, declaratory of such purposes.

It then stated the passing of the Municipal Corporation Reform Act, and the election of a mayor, aldermen, and councillors for the borough, in pursuance of that act.

It then alleged, that the relators and plaintiffs had discovered that such sums were assigned or transferred to Messrs. Wilson, Beckett, and Blayds, some time after the 30th of May 1835, but without any consideration, and as trustees for the mayor, aldermen, and assistants, or the corporation of which the said mayor, aldermen, and assistants were the officers, and that the same sums were directed to be transferred or assigned at the meeting, held on the 30th of May 1835, to Messrs. Wilson, Beckett, and Blayds collusively, and without consideration, and in order to disappoint, as far as possible, the objects and intentions of parliament, in passing the said act; and such transfer and assignment were made with the same object, and that the only appropriation which was made of the same sums or either of them, was made between the 5th of June 1835 and the day of the declaration of the election of the council of the said borough, within the meaning of the said act of parliament; and, in fact, no transfer or assignment was made, or at least completed, and no trust was declared of the said sums, or either of them, until after the 5th of June 1835, nor was any such trust declared until after the said act of parliament had passed; and although it was alleged, that such sum or certain parts thereof had since been sold and disposed of, they had been sold and disposed of contrary to the express provisions of the said act, and had been applied in a manner which, even if the said act had not been passed, would have been improper and unjustifiable: that on the 24th of November 1835, four several deeds were executed by Wilson, Beckett, and Blayds, to which deeds the corporation were made parties, but did not execute any of them. The effect of these deeds was to direct the

proceeds of the two sums to be applied as follows—namely, 500 guineas to the recorder of Leeds, 100 guineas to the deputy recorder, 750*l.* 3*l.* per cent. consols to the Treasurer of the Leeds General Infirmary for the benefit of that institution, 500*l.* 3*l.* per cents. for the Leeds Fever Hospital, and 250*l.* 3*l.* per cents. for the Leeds Public Dispensary; the interest of 1,000*l.* 3*l.* per cent. to the incumbent of St. Mary's church in Leeds, the interest of 1,000*l.* 3*l.* per cents. to the incumbent of Christchurch, Leeds, and 500*l.* 3*l.* per cents. for building a gallery in St. Mark's church of Woodhouse, in the township of Leeds; and the residue towards paying the debts of the corporation.

The recorder and deputy recorder declined to accept the sums proposed to be given to them.

On the 22nd of May 1835, notice was given in the House of Commons, of the intention of government to bring in a bill to amend municipal corporations, and leave to bring in the bill was given on the 5th of June.

It was also charged, that shortly before the 30th of May 1835, a scheme or plan was suggested or formed, by or with the privity of some of the members of the said corporation, for preventing the said sums of 6,500*l.* and 500*l.* passing into the hands, or coming under the controul of the members of the new or reformed corporation, which might be established under the act of parliament then expected to be made or passed in the course of a short time, for the reform of municipal corporations; and it was then or shortly afterwards suggested or arranged by or between such members, that the matter should be contrived so as to enable the said mayor, aldermen, and assistants, to repossess themselves of the said two sums, or some part thereof, in case the said act should not pass, or they or their political friends should become the governing body, or the majority of the governing body, of the said corporation; and, in fact, the transfer and assurance directed to be made, and afterwards made of the said stock and sum, and many of the trusts subsequently declared thereof, were made in pursuance of the aforesaid scheme or plan; and in carrying or attempting to carry the same into effect, several meetings

of the said members were held, and the name and seal of the said corporation, and the names of the said mayor, aldermen, and assistants, were improperly and irregularly used by the members engaged therein; that Griffith Wright, Henry Hall, Christopher Beckett, Richard Bramley, and Thomas Charlesworth, were the members of the said corporation, who were engaged in transacting and carrying into effect the aforesaid scheme or plan, and they attended and were the only members of the said corporation who attended all the meetings held for that purpose; and if any other members were present at some of such meetings, they were not present at all of them.

The information was filed against all the trustees of the fund, and the parties who were to take any benefit under the proposed application of it, and also against the five last-mentioned members of the corporation. It prayed, that the transfer of the stock might be declared fraudulent, and that Messrs. Wilson, Beckett, and Blayds, and also Messrs. Wright, Hall, Christopher Beckett, Bramley, and Charlesworth, might be declared liable to make good the sum transferred.

In March 1837, after part of the fund in question had been applied according to the directions of the deeds of November 1835, an injunction was granted by the Vice Chancellor to restrain the trustees from parting with the residue of it, which then remained in their hands.

Three demurrers were put in to this information and bill, one by the parties beneficially interested under the deeds of November 1835, another by the trustees who were sought to be rendered personally liable, and a third by Mr. Christopher Beckett.

Sir C. Wetherell, Mr. Knight Bruce, and Mr. Bethell, in support of the demurrers, contended, that the municipal reform bill merely introduced alterations respecting the powers and modes of proceeding of the corporation, but did not change the identity; that the bill was informal, because the parties complaining were the same body whose acts formed the subject of complaint; that a corporate body had a right, before the passing of the late act, to alienate and dispose of their property in

any way they thought proper, either with or without any legal consideration, and that right had been exercised in this case; before the bill was brought into parliament.

Sutton Hospital case, 10 Coke, 1.

Attorney General v. Heelis, 2 Sim. & Stu. 67; s. c. 2 Law J. Rep. Chanc. 35, 189.

The Mayor of Colchester v. Lowten, 1 Ves. & Bea. 226.

That the 97th section directed a special remedy in case of any improper disposition of the corporate funds, and the jurisdiction of this Court was thereby taken away.

The King v. Burrige, 3 P. Wms. 460.

The King v. Dickenson, 1 Saund. 135, b, n.

The King v. Robinson, 2 Burr. 804.

Griffith v. Appreece, 19 Vin. Abr. 512.

That this information was also informal, as it sought to make individuals liable for acts done by the corporation; and that this case was different from that of *The Attorney General v. Aspinall* (1), because here the resolution of the corporation preceded the introduction of the bill; and even in that case the opinion of Lord Langdale was against the information.

The Solicitor General, Mr. Jacob, and *Mr. Walker*, contra, insisted that the corporation held this property on certain trusts, and that if a breach of trust was committed by them, the jurisdiction of this Court was not taken away by the 97th section; that the remedy pointed out in that section, was cumulative, as was decided by the Lord Chancellor in *The Attorney General v. Aspinall*; and see

Beckford v. Hood, 7 Term Rep. 620.

Chapman v. Pickersgill, 2 Wils. 145.

That the assignment of this property was not completed till after the act had passed, inasmuch as a resolution did not divest the corporation of the stock; and even after that resolution, they had a right to direct for what purposes it should be applied.

The Charitable Corporation v. Sutton, 2 Atk. 400.

Dummer v. the Corporation of Chippenham, 14 Ves. 245.

(1) 2 Myl. & C. 613, and ante, p. 51, where the various clauses referred to in this case are set out.

The Attorney General v. the Corporation of Norwich, 1 Keen, 700; s. c. 2 M. & Cr. 406.

THE VICE CHANCELLOR.—This case has been argued with great ability; and as it has occupied several days, I have had an opportunity of considering it. It appears to me, however, that a great deal of what has been said is really not applicable to the case; because, upon looking through this very voluminous information and bill, I am bound to take it that there has not been any final and effectual alienation made by the corporation of Leeds of that property, which is the subject of complaint. As to the 500*l.* secured on tolls, what was the nature of that security is so imperfectly stated in the information and bill, that it appears to me not necessary, for the purpose of deciding the question on these demurrers, to notice them; but it is quite sufficient for the present purpose to confine my attention to the sum of 6,500*l.* 3*l.* per cent. consols. [His Honour read the allegations as before set forth.]

Now, upon those allegations it appears to me that if the transfer of the consols, which is stated, took place, the beneficial property in them was not altered; because, I apprehend that it was necessary for the corporation, by a corporate act, to divest themselves of their property; and that unless they did execute some instrument binding them—some instrument under seal—they could not divest themselves of their beneficial interest in the 6,500*l.* consols, but that this sum remained vested in the gentlemen who happened to become trustees of it, as trustees for the corporation. And it does not appear to me that the resolution, which was made on the 30th of May 1835, in the way in which it was made, attending to the charges that are contained in this information, did divest the corporation. The corporation, therefore, stand in a situation in which they may call upon those who happen to be the mere legal depositaries of the 6,500*l.* consols, for either a transfer to other trustees, or a transfer for any purpose which the corporation may think proper to direct.

It does not appear to me, that the Municipal Corporation Act has at all destroyed the character of corporations, but has

merely continued the existence of the old corporations, varying only the mode in which certain officers of the corporation should be chosen. But there is this to be observed, that though the mode of choosing the officers of the corporation is varied, and the corporation in law remains the same, yet the application of the funds belonging to the corporation is varied; because, by the 92nd section, after certain dispositions which the act has specifically directed with respect to corporate funds, it is expressly declared that the surplus thereof shall be applied under the direction of the council for the public benefit of the inhabitants and improvement of the borough. There is, therefore, a sort of public trust affixed upon that, which, antecedent to the act, was mere corporate property, capable, as Sir Charles Wetherell has very properly said, of disposition in any manner at the mere will of the corporation. But now the novelty that has been introduced by the act of parliament consists of two things: in the first place, that the fund itself is impressed with the character of a fund applicable for public purposes; and, moreover, that it is to be applied under the direction of the council. It seems to me, attending to the allegations which are in this information and bill, that the corporation are, after the passing of this act, merely calling, by this information and bill, for a restitution of their own property, with the beneficial interest in which they have never parted.

Then, it is said, that they are not at liberty so to do, because the 97th section has created a particular mode of remedying certain misapplications which might have been made of the corporation property. But it really appears to me, having read this section over and over again, that if the matter had not been already decided, as I think it has, this 97th section cannot be considered as having ousted the general jurisdiction which the Court would entertain, of enforcing a mere trust. The act of parliament, I admit, has, to a certain extent, changed the form of remedy, because inasmuch as the corporate property is now impressed with the character of what I may call property applicable to public purposes, it may be right that the Attorney General, in all instances, should sue as the

informant along with the corporation. But for that circumstance, it appears to me that the corporation itself might have filed a bill as the *cestuis que trust*, and have called on those persons who have placed themselves in the situation of trustees, to give an account of their trust, and to let the corporation have the use of its own property. But it seems to me that it never could have been the intention of the legislature, by the provisions of this 97th section, to have ousted the general jurisdiction which this Court would, before the act was passed, have entertained; because, in the first place, it is observable that the remedy is of an extremely minute and special nature, and was only to be exercised (as I understand it) within a certain limited period of time, namely, within six months after the first election of councillors. And it does seem a most singular thing, that inasmuch as it might possibly happen that within the first six calendar months the parties who were to complain might not have a knowledge of the fact, that, therefore, any alienation, however improper, should be unaffected, merely because the town council had not such information as would enable them to quarrel with the fact, within the limited time. I cannot think that that was the intention of the legislature. And moreover it appears to me, that the latter part of the section throws a light upon it, because the very power which is given, as it appears to me, to his Majesty in council to order that certain alienations shall not be called in question, is not a general power to his Majesty in council to order that any given alienation shall not be called in question, but only to order that the same shall not be called in question, *under the provisions of this act*; "and in such case as last aforesaid, the same shall not be called in question, or set aside, or affected under the provisions of this act." Now, it appears to me, that the two things are commensurate, and it was meant that the power of his Majesty in council should be limited and restricted to that very thing which is mentioned generally in the section, namely, the proceeding under the provisions of the act; and the restrictive words which are used are, as it appears to me, confined only to one special mode of proceeding, which, upon the face of the

section, was of itself to take place in a given form and within a given time. I think, even on the principle on which Sir Charles Wetherell has so ably argued that point this morning, that if it were clear that, antecedent to the passing of the act, this Court would have had a jurisdiction to take care, on behalf of a corporation complaining as *cestuis que trust*, of that property which was in the hands of their trustees, there are no restrictive words to destroy that antecedent right; but there is only a peculiar cumulative remedy given in a very limited form for the purpose of setting aside certain alienations that might happen to be discovered by the town council.

But if there were any doubt upon this point in my own mind, it really appears to me, that what has taken place in the case of *The Attorney General v. Aspinwall* is conclusive on the point; because there, though the demurrer was allowed to the information when it came on before my Lord Langdale, yet when the matter was brought before my Lord Chancellor on appeal, he overruled the demurrer; and how could he have overruled the demurrer in that case, unless there was a general jurisdiction entertained by this Court for the purpose of inquiring into the transactions which were there stated? And I observe also, that in the language which my Lord Chancellor, when he was Master of the Rolls, used, with reference to dissolving the injunction, which (as I understand it) was granted on the original information filed in that case, he dissolved the injunction for the express purpose of reserving to himself the consideration of the question, whenever the parties, who were defendants, had completed those acts so as to enable them to raise the question. It is plain, therefore, that even at that period his Lordship considered that this Court would have jurisdiction to inquire into such a case as was brought forward on the original information. And when the supplemental information was filed, we see that, by overruling the demurrer, he expressly assumed to himself the jurisdiction. My opinion therefore is, that even if I had had any doubts, they would have been overruled by the authority of the Lord Chan-

cellor. But I really have no doubt; and I concur entirely in the opinion which has been expressed by my Lord Chancellor on that point; and it appears to me, therefore, that the demurrers must be overruled.

But it is supposed that there is something peculiar in the case of Mr. Beckett, and Mr. Wright, and Mr. Bramley, and Mr. Charlesworth. All the persons, who join in one demurrer, are, as I understand it, in the situation of those who, by means of the four indentures that are stated in the information, have acquired a sort of right to claim a participation in the 6,500*l.* consols; and with respect to them my opinion is clear, that the information can be maintained. Now, with respect to Mr. Beckett, it appears that he was formerly an alderman; Mr. Wright was formerly the mayor; Mr. Bramley was an alderman; and Mr. Charlesworth was an assistant. [His Honour read the statements of the information which related to these gentlemen.] Now, the statement that they are personally answerable, of itself would be of no value unless there were facts stated in the information which go to shew of themselves that they are personally answerable. It does appear to me, if four members of the corporation choose to contrive a scheme, the effect of which will be, illegally to dispossess the corporation of its funds, that *prima facie* those four persons are personally answerable; and that this Court has made individual corporators in similar cases personally answerable. I think, therefore, that the demurrer put in by those gentlemen must also be overruled.

M. R. }
Dec. 9. } EVANS v. EVANS.

Practice.—Decree.

The defendant did not appear at the hearing, and the plaintiff took such decree as he could abide by; the affidavit of service of the subpoena to hear judgment proving defective, —Held, that the cause must be set down again at the bottom of the list.

In this case, the defendant did not appear at the hearing, and the plaintiff took

such decree as he could abide by. It was afterwards discovered, that the affidavit of service of the subpoena to hear judgment, was not regular, and which prevented the decree being drawn up.

Mr. Koe now moved to reinstate the cause, alleging, that the officers of the Court entertained great doubts as to what course ought to be pursued in such a case.

The MASTER OF THE ROLLS refused to make any order, and stated, that the proper way would be to set down the cause again at the bottom of the list, and bring it on again in the usual way.

L.C. }
Nov. 21. } *Re PRIDEAUX, A LUNATIC.*

Practice.—1 Will. 4. c. 60—*Lunatic.*

Upon an application, under the 1 Will. 4. c. 60, for the transfer of a sum of stock standing in the name of a lunatic trustee, the Lord Chancellor refused to adopt the facts as found in a suit in the Exchequer, and directed the usual reference.

In a suit instituted in the Exchequer, it had been found that certain stock was standing in the name of a lunatic and another person as trustees, and a petition was presented here, under the 1 Will. 4. c. 60, to obtain a transfer. It was proposed that, in order to save expense, the Court should adopt and act upon the facts so found in the Exchequer suit; but

The LORD CHANCELLOR declined making such an order: as the Court of Exchequer had no jurisdiction in matters of lunacy,

he could not adopt the proceedings; and he said, that the usual reference must therefore be made.

L.C. }
Nov. 21. } HALL V. RIMEL.

Practice.—*Notice of Motion.*

It is irregular, except by special leave of the Court, to serve a defendant with notice of a motion before he has appeared.

The defendant was, on the same day, served with a subpoena to appear and answer the bill, and also with a notice of motion for an injunction. Two days after, namely, on the 17th of July, an appearance was entered, and the plaintiff afterwards obtained the injunction in the defendant's absence, which the Vice Chancellor dissolved for irregularity.

Mr. Stinton, by way of appeal, moved to discharge the order of the Vice Chancellor, contending, that no such rule existed as that stated in the placitum to this case; and cited *Wyatt, Pr. Reg.* 286, 1 *Smith, Ch. Pr.* 65.

Mr. Wright, contra.

The LORD CHANCELLOR agreed in opinion with the Vice Chancellor, and said, that the reason why a notice of motion could not be given until after an appearance, was, that the defendant had not submitted to the jurisdiction, and therefore ought not to be prejudiced; that it required a special case to be made out to induce the Court to interfere before an appearance had been entered, when by special leave a notice of motion might be given before appearance.

END OF MICHAELMAS TERM, 1857.

CASES ARGUED AND DETERMINED

IN THE

Court of Chancery.

HILARY TERM, 1 VICTORIA.

M.R. }
Jan. 19, 20. } COLLINSON v. PATRICK.

Trust—Consideration—Appointment.

A bond debt being assigned to trustees on trust for such persons as A, a feme covert, should appoint, and in default for her separate use, she appointed it to a creditor of her husband, to secure an existing debt. No other consideration appeared on the face of the deed:—Held, that this was an "executed trust" in favour of the creditor, which the Court would effectuate, notwithstanding the apparent want of consideration.

This was a supplemental bill. It appeared that Thomas Etheridge, the testator, mentioned in the original cause, was indebted to William Catling, on bond dated in 1801, and that by an indenture of the 9th of December 1833, William Catling, in pursuance of an agreement, dated in 1829, assigned this bond and all benefit thereof to trustees, upon trust, "for such person or persons, and for such interest or interests, upon such trusts, and for such intents and purposes, and with, under, and subject to such conditions, powers, provisoes, limitations, charges, and declarations, and in such manner and form as his daughter Eliza-

beth Pownall, the wife of Edward Pownall, at any time or times, and from time to time, notwithstanding her present or any future coverture, and whether covert or sole, by any deed or deeds, instrument or instruments in writing, with or without power of revocation, under her hand and seal, or under her hand only, or by her last will and testament, or any codicil thereto, or any paper or writing in the nature of or purporting to be her will or a codicil thereto, should direct, limit, or appoint; and in default thereof, for the sole and separate use and benefit of said Elizabeth Pownall, the wife of the said Edward Pownall, her executors, administrators, and assigns, to be assigned and disposed of accordingly, and not to be subject to the debts, contracts, or engagements, or controul of the said Edward Pownall, or any future husband or husbands of her, the said Elizabeth Pownall."

Mr. Pownall, it appeared, had acted as the agent and solicitor of the plaintiff Mrs. Collinson and her two daughters, and had appropriated to his own use monies belonging to them, and being consequently indebted to them, by an indenture, dated the 7th of January 1834, and made between Elizabeth Pownall of

the first part, Edward Pownall of the second part, the plaintiff, Maria Collinson, of the third part, and the other plaintiffs, Anna Maria Collinson and Caroline Palmer Collinson, of the fourth part, reciting, among other things, the bond of the 18th of November 1801, and the indenture of assignment, dated the 9th of December 1833, and reciting, that a partnership had then lately subsisted between Edward Pownall and William Pownall Hunt, as attornies and solicitors at Ipswich, but that the same had been recently dissolved, and that during the existence of such partnership, Edward Pownall borrowed and appropriated the sum of 1,000*l.*, belonging to the plaintiff Anna Maria Collinson, and also the sum of 1,500*l.*, belonging to the plaintiff Anna M. and Caroline P. Collinson, and reciting (falsely) an indenture of appointment of the 4th of January 1834, whereby Elizabeth Pownall was alleged to have appointed to trustees the trust monies assigned by the indenture of the 9th of December 1833, upon trust to raise thereout the sum of 350*l.*, and reciting, that in order to save harmless, and indemnify the plaintiffs, Anna Maria Collinson and Caroline Palmer Collinson, in case they should not be able to recover from the joint or separate estate of Pownall and Hunt, the whole of the sums so borrowed and appropriated by Edward Pownall, the said Elizabeth Pownall had proposed and agreed to make and execute the appointment therein contained,—it was witnessed, that in pursuance of and for effecting the said proposal and agreement, and in consideration of the premises, Elizabeth Pownall, in execution of the power given to her by the indenture of assignment, directed, limited, and appointed that all and every the sums of money to which she was entitled under the said assignment, and all her interest &c. therein and thereto, should vest in the plaintiff Maria Collinson, her executors, administrators, and assigns, as her and their own absolute properties upon trust (subject to the alleged appointment for raising 350*l.*), to indemnify the plaintiffs from all losses, costs, &c., they might bear by reason of Edward Pownall having borrowed and appropriated the said two sums of 1,000*l.* and 1,500*l.*, and to pay the plaintiffs, Anna Maria Collinson and Caro-

line Palmer Collinson, so much of the sums appropriated by Edward Pownall, as they should not be able to recover from the joint and separate estates of Pownall and Hunt, and to stand possessed of the residue upon the trusts of the indenture of the 19th of December 1833.

The original bill was filed in March 1832, by Catling and Mr. and Mrs. Pownall, against the representatives of the obligor of the bond, who was dead, praying that the rights and interests of the plaintiffs, under the bond, and the will of the testator and obligor of the bond, might be ascertained, and for the establishment and execution of the trusts of the will. The usual decree for the accounts was made at the hearing on the 26th of February 1834.

The supplemental bill in this case was filed, in May 1835, by Mrs. and the two Miss Collinsons, which, after stating the above facts, stated, by way of supplement, the deed of January 1834; and that on the 10th of March 1834, a fiat of bankruptcy issued against Edward Pownall, who had been declared a bankrupt, and that thereby the original suit had become abated or defective, but that Pownall and his wife and Catling had declined to supply the defect therein, or to make the same complete or effective; and the bill prayed that they might have the benefit of the original suit and the proceedings therein, in respect of the bond, and for an account of what was due to plaintiffs on their said security, and for payment thereof out of the estate of Thomas Etheridge.

The defence set up by Mrs. Pownall was, that the deed was executed on a verbal agreement, (not stated in the deed,) that the Collinsons would continue to employ her husband as their solicitor, which they had not done, and that therefore, the consideration for the deed having failed, this Court ought not to enforce it; secondly, that this being an executory trust, which the Court was called on to enforce, a sufficient valuable consideration was necessary to induce the Court to carry it into effect against Mrs. Pownall; and thirdly, that the proceeding by supplemental bill was irregular, as the suit had not become defective by the bankruptcy of the husband, who had no interest in the wife's separate estate; and fourthly,

the deed of 1834 being made subject to an alleged deed of 1833, for securing 350*l.*, which deed did not exist, whether the plaintiff was entitled to claim the amount due on the bond, discharged of that sum of 350*l.*

Mr. Kettle, one of the defendant's witnesses, deposed, that when he took the deed of 1834 over to the plaintiffs at Brussels, and handed it over, Mrs. Collinson, who acted as the agent of her daughters, assented to the retainer of the 350*l.* by Mrs. Pownall, "and gave him a positive assurance, that she would, upon receiving the said deed, not withdraw her business from the defendant Edward Pownall, but, on the contrary, would do him all the good in her power;" it was also proved, that Mary Collinson, from the date of the deed, "ceased altogether to employ Mr. Pownall, and never did after that time employ him on a single occasion."

On the other hand, it was contended on the part of the plaintiffs, that on the execution of the power of appointment by Mrs. Pownall, the trustees of the fund became trustees for the plaintiff. That all had been done, which was feasible, to pass the interest in the bond to the plaintiffs, and that this was a case of an executed and not of an executory trust.

Mr. Tinney and Mr. James Russell, for the plaintiffs, cited—

Fortescue v. Barnett, 3 Myl. & K. 36;

s. c. 2 Law J. Rep. (n.s.) Chanc. 98.

Sloane v. Cadogan, 2 Sug. Vend. 370.

Godsal v. Webb, post.

Mr. Pemberton and Mr. Teed, for Mrs. Pownall, cited—

Colman v. Sarrell, 1 Ves. jun. 49.

Pulbertoft v. Pulbertoft, 18 Ves. 84.

Edwards v. Jones, 1 M. & Cr. 226;

s. c. 4 Law J. Rep. (n.s.) Chanc. 163, and 5 *ibid.* 194.

Mr. Richards for Mr. Pownall.

Mr. G. Turner, Mr. Geldart, and *Mr. E. Montagu*, for other parties.

Mr. Tinney, in reply.

Jan. 20.—THE MASTER OF THE ROLLS.—This must be admitted to be a hard case on either side. The plaintiffs have been defrauded of very considerable sums of money, and unless they obtain the benefit of the security on which they relied, they

will suffer from the effect of the fraud practised on them. On the other hand, Mrs. Pownall seems to have executed a deed, under the intention of saving her husband from great loss or ruin; and if she is bound by the deed, she will part with her property without having attained the object she must be presumed to have had in view when she executed it. In either case, it seems to me, that a considerable hardship will be inflicted on the party who does not succeed.—[His Lordship detailed the circumstances of the case, and particularly the deed, and proceeded:]—This deed having been executed, the persons who were entitled to the benefit of it, the two Miss Collinsons and Mrs. Collinson, filed their bill on the 12th of May 1835, to have the benefit of the former proceeding; and very many objections were raised to the relief which they here pray. First of all, it is said, this deed was, in fact, executed for a consideration, which is not stated in the deed, but which consideration was the real ground on which the deed was executed, and that the duty which was undertaken by Mrs. Collinson was never performed, in pursuance of the contract: next, it is stated, that this was a deed executed without any consideration; that it was not what is called in this court, "a trust executed," but that there was something else required to be done; and in consequence of there being something else necessary to be done, which was not done by the deed, it requires the intervention of this Court as against the person who created the trust, and there being an absence of consideration, it cannot be enforced in this court. Then, again, it is said, that this suit is not constituted in such a way as to be conformable to the ordinary rules of this court.

Now with respect to the first point, as to the consideration, which, it is said, was never paid, or the duty, which it is said was implied in that consideration, but was never performed,—it does not appear to me, that in the present state of the record, and in the absence of any cross bill, I can enter into that question. I do not think the record is so framed as to enable me to adjudicate on that question, if there really be a question of the kind in this case. On the second point, after the best considera-

tion I can give to it, I must say, it seems to me, that as between Mrs. Collinson and the Miss Collinsons, on the one hand, and Mrs. Pownall on the other, it is what the Court is in the habit of calling "a trust executed." It is a trust in which the relation between *trustee and cestui que trust* has been established, so far as depends on the person who created that trust. Now, certainly it has occurred to me, as a matter well worthy of consideration here, how far the peculiar situation of a married woman ought, in the consideration of this Court, to entitle her to that species of protection which at law, in cases of legal obligations on contracts for indemnity, is actually afforded to a person who enters into such a contract. If there be a legal obligation to afford an indemnity, I apprehend that, on an action to have the benefit of the legal obligation, a court of law would consider whether it had been entered into for a valid consideration or not; and it has occurred to me, whether something analogous to that might not be introduced by a court of equity into the consideration of a trust of this nature. A declaration of trust has, in a court of equity, the same effect as a transfer of the legal estate, or as the vesting of a legal interest has in a court of law. The transaction being complete, is not to be disturbed for want of consideration; and if this had rested on the agreement alone of Mrs. Pownall, if there had been an agreement not conferring a legal interest, as far as the term "legal interest" is applicable to cases of this nature, if it had been a contract to be executed by the adjudication of this Court, as in a case of specific performance, I am then of opinion that, in the absence of all consideration, there could not have been a specific performance; but if there has been that done in this deed, which in the case of a legal interest would confer the estate, then, I apprehend, the want of consideration does not prevent this Court giving it effect; and this, I think, on the consideration of this deed, to be really the effect of it. The question, whether something is to be done, that is, whether a trust is executed or executory, in cases of this nature, is to be considered between the person creating the trust, and the person claiming the benefit of the trust. It is not to be consi-

dered between either of those persons and a stranger, to whom the subject of the trust may afterwards have been given.

Thinking this deed does give such an interest to the plaintiffs that entitles them to the benefit of it, the only question that remains is, whether this is a proper mode of bringing forward that question. I confess it does appear to me to be perfectly clear, that this is the only mode in which they could bring it forward in a proper and satisfactory manner. The interest, which at the commencement of these proceedings, and during their progress till the decree, was vested in Mrs. Pownall, was transferred to the persons to whom she executed the power of appointment, and her interest passed to them. This was not mentioned at the hearing. If it had been, I think, that the hearing would have been postponed, because it would then have appeared there were persons interested not before the Court. But it does appear to me to be quite in conformity with ordinary principles, that in respect of that transfer of interest there should be a bill filed by the parties to have the benefit of the proceedings, if they are satisfied with the proceedings that have taken place. There are other circumstances that seem to me to make it necessary. The original bill was filed by the husband and wife and Mr. Catling. Mr. Catling was the person who was the obligee in the bond; the bond had not been assigned, but there was an agreement only to assign it, and he was therefore, previous to the institution of the suit, the obligee of the bond, subject to an agreement to assign it. He, together with Mr. and Mrs. Pownall, partly in respect of her separate interest, and partly in respect of an interest to which he was entitled in her right, commenced and prosecuted these proceedings, as her separate interest was an interest to be established as against the assets of the testator. The residuary legatees were all made parties, from the particular constitution of the suit; and in this state of circumstances Mr. Pownall, having become bankrupt, was no longer capable of prosecuting the suit for his own advantage; the suit therefore, not having become abated, but (in other language, not adopted in this Court, although if it were adopted, I am persuaded, it would remove

great difficulties), having clearly become defective in such a way that there was not the representation of a material interest in the cause, it therefore became necessary that somebody or other should institute proceedings for the purpose of enabling all who were interested in it, to have it prosecuted, and to have their rights established. I think the bill was not improperly filed, and that the plaintiffs having an interest in the estate of Mr. Etheridge, are not improper parties; and the plaintiffs are consequently entitled to the benefit of the decree, and of the former proceedings.

There are questions, and important questions, as to costs, which may hereafter have to be considered. I am strongly—most strongly, inclined to think, that if it should appear there are any costs occasioned in addition to the ordinary costs of this suit, by the appointment, those costs ought not to be allowed out of the general estate of Mr. Etheridge, but ought to fall on and be paid out of that share of the estate of Mr. Etheridge, claimed by these parties under the appointment.

L.C. }
Jan. 24, 27. } BANNATYNE v. LEADER.

Bankrupt Act, Section 88—Construction—Power of Attorney.

The Bankrupt Act declares that no suit in equity shall be commenced by the assignees, without the consent of the major part, in value, of the creditors who have proved, present at a meeting of creditors:—Held, that creditors are, under this section, empowered to vote by their attorney duly authorized.

The question in this case was, whether the consent of the creditors to the proceedings in this cause, had or had not been regularly obtained, for prosecuting this suit. By the Bankrupt Act, 6 Geo. 4. c. 16. s. 88, the assignees, "with the consent of the major part, in value, of creditors who shall have proved under the commission, present at any meeting," are empowered to compound debts, or to submit disputes to arbitration, and declares that "no

suit in equity shall be commenced by the assignees, without such consent as aforesaid," and it provides, "that if one-third in value, or upwards, of such creditors, shall not attend at any such meeting, (whereof such notice shall have been given as aforesaid,) the assignees shall have power, with the consent of the commissioners, testified in writing under their hands, to do any of the matters aforesaid."

It appeared, that a meeting of the creditors of the bankrupt had been duly convened, to authorize this suit. The debts proved amounted to 160,000*l.*, and creditors and persons representing them attended, whose debts amounted to 101,000*l.*, and who sanctioned this suit; but the greater number of the creditors being resident in Scotland, the principal part of the persons who attended were parties merely representing creditors in Scotland, under powers of attorney, so that the creditors who personally attended and voted, were admitted to have been less than one-third in value; and the question was, whether the consent of those creditors present by attorney, was valid under this section of the act.

The suit having been commenced—

Mr. J. Russell on behalf of *Mr. Belcher*, the official assignee, whose name had been used as co-plaintiff by the creditors' assignees, moved that his name might be struck out of the bill, contending, that the act required that the creditors themselves should "be present at the meeting," in order to assent to a suit, and that the presence of their attorneys was not a sufficient compliance with the terms of the act. He argued, that where a party was doing an act which affected his own interests alone, and which flowed out of his own rights, he might delegate those rights or power; thus, he might authorize another to execute a deed for him; but where the power was given by statute, and affected the rights of others, then he could not delegate it, except the statute expressly gave him the power:—that the consent mentioned in the 88th section bound the interests of all the creditors present or absent, and to delegate such a power would be as absurd as to vote by deputy for a member of parliament. Again, a creditor could not be said to be "present at such meeting" in

England, if *de facto* in Scotland, and the particular provision made for the case, where one-third of the creditors "should not attend any such meeting," shewed that a corporeal presence was intended by the act:—that it was meant that the parties should, at such meeting, consider and discuss the propriety of the contemplated proceedings; and it was necessary, therefore, that every person should be present, in order to have the means of judging of the prudence of commencing a suit. That where the act intended creditors to act by attorney, it expressly provided for it, as in the 61st section, where persons are empowered to vote for assignees by attorney.

Mr. G. Richards, *contrâ*.—It has always been considered sufficient in practice, if a creditor consents to the institution of a suit by his attorney lawfully authorized; and as that which a party can do himself, he can generally do by attorney, it must be shewn that the act of parliament prevents the delegation of power in the present instance. The result of allowing the objection to prevail, will be, to prevent all creditors residing at a distance from the place of meeting, however great their interest may be, from having a voice in the question, whether an improvident suit should be instituted or not at the expense of the estate. The attorney will be as competent to deliberate at the meeting as the creditor himself; and it is most improbable that the creditor will select an incompetent or improper person to represent his interests at the meeting. The 102nd section enacts, "That at the meeting of creditors for the choice of assignees, the major part of such creditors *there present*," may direct, when the money arising from the bankrupt's estate shall be paid in; but, on referring to the 61st section, the creditors *there present* may be represented by attorney. This shews what the meaning of the legislature was. The same remark applies to the 133rd section, where the words "assembled at such meeting" and "there present" occur. The 135th section directs that the act shall be construed beneficially for creditors, and that the then present practice in bankruptcy shall not be altered. He cited *Ex parte Lewellyn* (1).

(1) 1 Des. 474.

Mr. Russell, in reply, observed that the right to vote by attorney in cases of composition under the 133rd section, was expressly given by the 134th section of the Bankrupt Act; and where a delegation was intended, it had been expressed.

January 27.—The LORD CHANCELLOR. —The question raised on this motion was, whether that which is authorized to be done by the 88th section of the Bankrupt Act, might be carried into effect by the authority of the creditors acting through the means of powers of attorney. The provisions of that section relate to assenting to suits and compromises, and also to various other acts which the majority of the creditors are authorized to assent to, leading to certain consequences indemnifying the assignees and authorizing the suit.

Now, in considering this, I must take it for granted, that the power of attorney is large enough; I must assume it was large enough to embrace the act in question; and I find the forms and powers of attorney given in the books of practice, in terms, include this particular act. I take it for granted, therefore, either the power of attorney in this case did include the act in question specifically, or was in terms large enough to embrace it.

Now, the object of that section is not only to prevent assignees from improvidently dealing with the estate without the controul of the creditors interested, but in certain cases effectually to give the assignees protection, if their acts are afterwards questioned, and to give the creditors a power of interfering and regulating those transactions which might affect the interest of the estate at large. Now, it is obvious, that if the creditors are not able to act under powers of attorney, a great part of the object of that section will be defeated; it would in many cases give a resident minority a power of controuling the majority, if the personal attendance of the creditors be required; and in some cases, if one-third of the whole in value are required to be present, it must prevent anything being done under that section at all, because, if two-thirds of the creditors lived at such a distance as to make their personal attendance impossible, there would never be the portion of the creditors which

is necessary to give a sanction to the act in question, present; it is obvious it would be productive of great inconvenience, and in many cases defeat the purposes of the section altogether. But it was said, I ought not to hold that the creditors might act under powers of attorney, because it is contrary to principle, that a man should be able by his deputy to do an act which will affect the interest of others. Now, the act in question, although it does in its consequences affect the interest of others, is in itself, an act on the part of the creditor alone; it is his act, and his assent in respect of the debt which he has proved, and an assent, therefore, in respect of the interest he has in the estate, to certain acts contemplated, to which the assignees ask the assent of the creditors to enable them to perform.

Now, there is no doubt that the act is of a description which would ordinarily be capable of being performed under a power of attorney. The act is the act of a creditor assenting to a certain thing being done affecting his interest, and in the ordinary exercise of a power of attorney, it would undoubtedly be competent for the attorney to deal for his principal in the particular case intended to be provided for by that section. The question, therefore, is, whether on looking at the whole of the Bankrupt Act together, there be anything in it to exclude the ordinary exercise of the authority delegated by the power of attorney.

Now, it appears there are four cases in the act, in which this species of delegated authority is contemplated, and in certain terms specifically provided for: the first is, the choice of assignees; the 61st section provides for the choice of assignees, and there it is expressly provided, that persons authorized by powers of attorney from the creditors, may vote, and it is argued, that as there is there an express authority to act by power of attorney, it leads at least to a conclusion that where it is not in terms given, the act did not intend that a power should be so exercised; but it is obvious that a power of voting by proxy for the election of persons who are to represent the interest of all the creditors, and to take care of the whole estate, is a different thing from assenting in respect of

the particular debt of the particular creditor, to a proposition of the assignees.

The next is signing the certificate. Now that also, like the assenting to or dissenting from the institution of the suit, or any other act contemplated by the 88th section, is an act, which in its consequences would affect the rights of other creditors, but still it is in itself the assent only of the particular creditor; and by the 102nd section, it is to be signed by a certain proportion in number and value of the creditors who have proved debts. Now, that section which directs what proportion of the creditors are to sign the certificate, in order to give it validity, does not describe what creditors are to sign, except that they are to be creditors who have proved; it does not include, nor in terms exclude a creditor, who, being absent, purposes to sign by power of attorney; but then the 124th section assumes that they have such a power, but does not give it; it only prescribes the evidence which is to prove the authority, if the authority be from a creditor in England, and certain other evidence, in the event of the creditor being abroad, and whose execution of the authority, therefore, is to be proved in a different manner: so that, looking at these different parts of the sections of the act, particularly the last, where the two acts are similar in their nature, it is clear, that in the last, the act contemplated that, without an express authority, the creditors might sign by means of their attorney; and it would obviously be inferred that there being no express provision one way or the other in the 88th section, the same rule applies to acts to be done under the 88th section.

Then, it is said that the 88th section requires, in terms, the consent of the majority of the creditors present at any meeting, which, it is contended, excludes creditors absent from acting by attorney. Whether that be a just construction of the terms of that section, is not necessary at present, I apprehend, to be considered, because there are other sections of the same act which put a construction on the use of the term "present." The 61st section having given the creditors present at the second meeting, but absent at the first, a right to vote by attorney in the choice of

assignees, the 102nd section directs, that at the meeting of creditors for the choice of assignees, it shall be the major part in value, of the creditors then present; which must mean the creditors voting in the choice of the assignees, who by the express authority of the act might be creditors present by the means of their attorney, to direct where the money shall be kept. It appears, therefore, that of the three acts of a similar nature, authorized by the act of parliament, namely, the assenting to a suit being instituted, the directing the custody of the money, and the signing of the certificate, the act clearly recognizes the right of the creditors to act by attorney in two of them, namely, directing where the money shall be kept, and signing the certificate; and in neither does it directly give the particular power, and in the former, it treats creditors so acting by attorney, as creditors present; it is, therefore, a fair inference, that in the third, namely, the authorizing the suit, a similar provision was intended, although the section speaks of creditors present. I have before said that I considered the act was in its nature one capable of being performed under a power of attorney, and it would require a positive enactment, or fair inference of a contrary intention, to contradict the object of the act; so far from finding any such enactment or inference, I think all the fair inferences from the act are in favour of the right to vote by power of attorney.

I am therefore of opinion, that the creditors described in the 88th section, include creditors acting and present by attorney voting under powers of attorney.

M. R.
Mar. 7, 1837. } CALVERT v. THE LONDON
Feb. 13, 1838. } DOCK COMPANY.

Principal and Surety—Release of Surety—Costs.

Sureties who had entered into a bond for the due performance of certain works by their principal, held to be released, by reason of larger payments than those authorized by the terms of the contract having, without their concurrence, been made to the principal, before the completion of the works.

Many of the circumstances relating to this case, will be found in our reports of *Cromfoot v. the London Dock Company* (1), and also in *Warre v. Calvert* (2).

The bill, in this case, was filed by E. S. P. Calvert, as legal and personal representative of Richard Laycock, deceased, and by Thomas Warburton, against the London Dock Company, Isaac Solly, stated to be their treasurer, and other persons, being the executrix and executors of James Warre, deceased; and it prayed for a declaration that the plaintiffs and the estate of Laycock were in equity released and discharged from the bond in the bill mentioned, or else that the London Dock Company has not, by breach of the condition, sustained any damage, from which, in equity, the company or the representatives of the obligee on their behalf, ought to be permitted to put the bond in suit against the plaintiffs, and that the defendants might be restrained by perpetual injunction from all further proceedings at law against the plaintiffs, respecting the matters in the bill mentioned.

The case was, that by a contract in writing, dated the 29th of September 1829, Robert Streather, a builder, agreed with James Warre, the treasurer of the London Dock Company, on behalf of the company, to perform certain works which were to be commenced twenty days after notice, and to be completed within twelve months from the commencement; that Streather was to provide all materials, labour, &c., in consideration of 52,200*l.*, and being allowed to appropriate to his own use certain materials mentioned. The engineer of the company was to be the sole judge of the works, and was to employ competent persons to perform the work, if Streather failed to do so, and in that case, the costs thereof were to be deducted from the sum due to Streather under the contract. A provision was made for varying the price, on any variation being made in the work specified in the contract, and Mr. Warre agreed to pay 52,000*l.* by instalments, viz. three-fourths of the cost of the works certified to be done every two months, and

(1) 4 Law J. Rep. (n.s.) Exch. 267; s. c. 2 Cr. & M. 637.

(2) 6 Law J. Rep. (n.s.) K.B. 219.

the remaining one-fourth within one month after the full completion of the contract.

On the 3rd of November 1829, Mr. Streather, and Mr. Warburton and Mr. Laycock, as his sureties, executed to James Warre, as treasurer of the company, their joint and several bond, for the sum of 5,000*l.*, conditioned to be void if Streather should well and truly observe, perform, and keep the covenants, promises, articles, matters, and things mentioned and contained in the agreement or contract, which, on the part of Streather, were and ought to be performed according to the intent and meaning of the contract.

Notice having been given, Streather commenced the works on the 28th of December 1829, but did not complete them in twelve months, or before the 28th of March 1831, to which day, the time for completing the works was enlarged, with the consent of Mr. Warburton and Mr. Laycock. The time having expired, the London Dock Company gave notice to the sureties that they would be called upon to pay the 5,000*l.* under the bond. On the 13th of April 1831, Streather quitted the works, and left the company in possession of engines, implements, and materials of great value belonging to him. He soon afterwards became bankrupt, and his assignees brought an action of trover against the company, for the engines, implements, and materials of Streather, in their possession (3): in the action, and the proceedings under a reference, which grew out of it, the assignees established their title to recover 316*l.*; but the bankrupt, Streather, appeared to be indebted to the company in a sum exceeding 8,000*l.* The company alleged that they had sustained damage to the amount of more than 7,000*l.*, by the default of Streather, and in January 1835, they caused actions to be brought against the sureties, to recover the full penalty of the bond. And in the particular of their demand, they stated that they had made payments on account of the contract, to the amount of 49,619*l.* 5*s.*, and in completing the works, 18,875*l.* 3*s.* 2*d.*, making together 68,494*l.* 8*s.* 2*d.* That there had become due to Streather on the contract,

52,200*l.*, for varied or increased work 3,721*l.* 16*s.* 8*d.*, and for the engine, implements, and materials he had left 4,857*l.* 3*s.* 9*d.*, making in all 60,779*l.* 0*s.* 5*d.* And they represented the difference, or 7,705*l.* 7*s.* 9*d.*, as the amount of their loss sustained by the non-performance by Streather of his contract.

Under these circumstances, the plaintiffs in March 1835 filed their bill, and after alleging that the referee in the action of the assignees against the company, had stated, that although the payment made to Streather amounted to 49,619*l.*, the value of the work done by Streather was only 36,429*l.*, they charged, that in executing the bond, the sureties considered, and had a right to consider, that the company, until the entire performance of the contract, would have retained in their hands so much of the contract price, as by the contract they were entitled to retain as a security for the due performance of the rest of the contract; and that the company, by advancing to Streather more than they were bound to do, deprived the plaintiffs of the benefit of that security, and thereby in equity, released them from the bond, or at least could not equitably recover against the plaintiffs any loss which they might have sustained, by making such advances, and ought not to be permitted to sue the plaintiffs on the bond, for if they had not made such advances, they would not have sustained any loss by the non-performance of the contract.

The common injunction was obtained for want of answers, and no motion was made either to dissolve it, or to extend it to stay trial. The actions were tried on the 20th of February 1836, and the plaintiffs there obtained nominal damages. But the plaintiffs in the action, who were the defendants here, applied to the Court of King's Bench to increase the damages, and the plaintiffs prosecuted the present suit to a hearing. The cause came on to be heard on the 7th of March last, before the application to the Court of King's Bench had been disposed of. On that account the hearing was postponed, but the proceedings in the King's Bench having ended in an order that the verdict should stand, the cause was brought on again; and what was now asked was, that the common in-

(3) *Crowfoot v. the London Dock Company*, 2 Cr. & M. 637; s. c. 4 Law J. Rep. (N.S.) Exch. 267.

junction which had been granted, might be made perpetual, and that the defendants might pay the costs of the suit.

Mr. Tinney, Mr. Kindersley, and Mr. Roupell, for the plaintiffs, contended, that the defendants, by making advances to Streather, of more than two-thirds of the value of the work done, had thereby released the sureties; and they asked for the costs of the proceedings both at law and in equity.

Mr. Pemberton, Mr. Phillimore, and Mr. Blunt, for the defendants, contended, that the sureties had not been released, and that the plaintiffs having a defence at law, were not justified in filing a bill in this court, especially as the question between the parties was a mere legal question; and that, the point of law having been decided, and nominal damages awarded, there was no reason to make any decree whatever.

February 13, 1838.—**LORD LANGDALE** [after stating the principal circumstances of the case].—The defendants did not dispute that their advances to Streather exceeded the sums which they were bound to advance under the contract; but they said that increased advances were made for the purpose of giving Streather increased facility to perform the contract; and they alleged that the performance of the work by Streather was impeded by the want of funds, and that by the advances made to him, he was enabled to do more than he would have done, and that to assist him was to assist his sureties, and that it was only for the purpose of affording that assistance that the company did more than they were obliged to do.

The argument, however, that the advances beyond the stipulations of the contract were calculated to be beneficial to the sureties, can be of no avail. In almost every case where the surety has been released, either in consequence of time being given to the principal debtor, or of a compromise being made with him, it has been contended, that what was done was beneficial to the surety, and the answer has always been, that the surety himself was the proper judge of that. No arrangement different from that contained in his contract is to be forced upon him; and bearing in mind that the surety, if he pays the debt,

ought to have the benefit of all the securities possessed by the creditors, the question always is, whether what has been done lessens that security.

In this case, the company were to pay for three-fourths of the work done every two months; the remaining one-fourth was to remain unpaid until the whole was completed, and the effect of this stipulation was, at the same time, to urge Streather to perform the work, and to leave in the hands of the company, a fund wherewith to complete the work, if he did not, and this did materially tend to protect the sureties. What the company did, was calculated to make it easier for Streather to complete the work, if he acted with prudence and good faith, but it also took away that particular sort of pressure, which, by the contract, was intended to be applied to him, and the company, instead of keeping themselves in the situation of debtors, having in their hands one-fourth of the value of the work done, became creditors to a large amount, without any security; and under these circumstances, I think their situation with respect to Streather, was so far altered, that the sureties must be considered discharged from the suretyship. I think, therefore, that the plaintiffs are entitled to have the injunction made perpetual, and that they are also entitled to the costs of this suit.

The plaintiffs appear not to have a complete legal defence, though they had a defence to reduce the damages to a nominal amount. They would not, however, anticipate the result of the action. They had an equitable defence, and under the circumstances of the case, if an application had been made for the purpose, I do not think that the plaintiffs in equity would have been ordered to give judgment; and after the verdict for nominal damages, the application made to the Court of King's Bench, by the plaintiffs at law, made it important for the defendants there to proceed with their bill in equity. Upon the whole, I am of opinion, that the plaintiffs are entitled to have the injunction made perpetual, and that they are also entitled to the costs of this suit.

Decree accordingly.

M.R. }
Jan. 15, 26. } WAKE v. PARKER.

Husband and Wife—Separate Estate—Demurrer—Misjoinder of Plaintiffs.

A bill filed by a husband and wife, in respect of the wife's separate estate, is demurrable. Leave to amend, by making the husband a defendant, was, however, given.

The testator, in this cause, devised and bequeathed an equal fifth part of his real estate, and of his residuary personal estate, to the plaintiff Mrs. Wake, the wife of the plaintiff Mr. Wake, for her separate use, without power of anticipation, for her life, and after her death, to her children in equal shares. The will contained no gift to Mr. Wake.

This bill was filed by Mr. and Mrs. Wake and their children, two of them being infants, suing by Mr. Wake as their next friend, against the trustee and executor, and the other devisees and legatees of the real estate and residuary personal estate, for an account, and for payment to Mrs. Wake, of her share of the rents, and for an investment of the share of the residuary personal estate, which was given to her for life, and after her death to her children, and for other purposes.

To this bill, two of the defendants, both of whom were residuary legatees, and one of whom was trustee and executor, put in a general demurrer for want of equity.

Mr. Kindersley and Mr. Bacon, in support of the demurrer, contended, that the husband and wife ought not to be permitted to sue together for the wife's separate estate, as their interests were conflicting;—that this bill must be regarded as the bill of the husband alone—*Paulet v. Delaval* (1), and *Hughes v. Evans* (2), and would not prevent the wife filing another bill—*Reeve v. Dalby* (3). In *Sigel v. Phelps* (4), the Vice Chancellor was of opinion, that a husband was improperly joined as co-plaintiff with his wife, in respect of her separate estate. They also argued, that the husband having no interest in the sub-

ject-matter of the suit, there was a misjoinder of plaintiffs, which rendered the bill demurrable—*The King of Spain v. Machado* (5).

Mr. Pemberton and Mr. Tillotson, in support of the bill, contended, that the effect of making the husband a defendant, would be merely to increase the expense of the suit, without affording any practical advantage; that the wife had a right to name any next friend, and it had been constantly the practice to make the husband the next friend; and that no reason existed why her husband, who, by the bill admitted her separate right, should not undertake the duty of next friend: In *Smyth v. Myers* (6), Sir John Leach, on an application to strike out the husband's name as next friend, and make him co-plaintiff, said, "that by joining his wife as co-plaintiff, he would admit the statement in the bill, that it was the separate property of the wife; and that it would answer all the purpose of making him a defendant." They urged, that when the property had been recovered, the Court would protect the interests of the wife, as in *Simons v. Horwood* (7).

Mr. Kindersley, in reply, contended, that *Simons v. Horwood* confirmed the principle he had contended for, as the Court, in a late stage of the cause, saw the difficulty; but the parties in that cause had not, by the answer, taken the objection for misjoinder, as they ought, in order to have insisted on it at the hearing—*Raffity v. King* (8);—that according to the authority of *Smyth v. Myers*, the husband might be bound, if made a co-plaintiff, but that it did not follow, that the wife would be precluded from filing another bill.

THE MASTER OF THE ROLLS—[after stating the circumstances of the case, proceeded:—] Courts of equity have, from an early period, permitted married women to sue for their separate estates by their next friend, and to make their husbands defendants; and a married woman, as to her separate estate, being considered as a feme sole, the

(1) 2 Ves. sen. 666.
(2) 1 Sim. & Stu. 185.
(3) 2 Sim. & Stu. 464.
(4) 7 Sim. 239; and see *Owden v. Campbell*, 6 Law J. Rep. (N.S.) Chanc. 311.

(5) 4 Russ. 225; and for other cases on misjoinder, see 6 Law J. Rep. (N.S.) Chanc. 93, n.

(6) 3 Mad. 474.

(7) 1 Keen, 7.

(8) 1 Keen, 601; s. c. 6 Law J. Rep. (N.S.) Chanc. 87.

Courts have acted upon the principle, that in the prosecution of such suits, her authority and consent should be necessary, and should be given and continued, independently of her husband ; and accordingly, it is said, in *Andrews v. Craddock* (9), that if such a bill be filed without the authority of the wife, the same may, upon her affidavit of the matter, be dismissed ; and from the case of *Lawley v. Halpen* (10), it appears, that if the wife has reason to think, that the next friend appointed by herself colludes with her husband, she may for that reason have her next friend changed, on procuring security to be given for costs.

Now, a suit instituted and carried on by the husband and wife, has been considered as the suit of the husband alone, and *prima facie*, at least, the wife cannot be said to have any controul or authority over it ; she may possibly have authorized her husband to prosecute the suit ; but in the absence of anything to shew that she had done so, the suit must be considered as the suit of the husband. It has, undoubtedly, been very usual to file such bills, and many decrees have been made without objection, in suits instituted by the husband and wife for the wife's separate estate, the Court itself taking care that the separate estate of the wife, recovered in such suits, shall be protected from the husband. Thus, in *Griffith v. Hood* (11), the bill was filed by the husband and wife, for the separate estate of the wife. Lord Hardwicke said, "Where there is anything for the separate use of the wife, a bill ought to be brought by her next friend for her, otherwise it is her husband's bill. However, there have been many cases of such bills, and the Court has taken care of the wife, and ordered payment to some person for her ;" and in that case, he ordered the interest of the money, which was to be invested, to be paid to the wife, or some person authorized by her for her separate use ; and it is in this way that the Court now commonly acts in such cases ; and it does not appear that any valid objection can be made to the practice. If the amount of the sum recovered be all that the wife is entitled to, and if the sum so recovered be

secured to her separate use, she has all that she could obtain in any suit, and could make no further or renewed claim against the accounting party, who had been compelled by the suit to satisfy her demand. In the case of *Chesslyn v. Smith* (12), where stock was settled to the separate use of a married woman, and after her death for her husband absolutely, Sir W. Grant, in a suit instituted by the husband and wife, decreed a transfer of the stock to the husband, on his giving personal security for the same ; and I think, that many cases have occurred of suits by husband and wife, in which the wife may have seemed to require protection from the husband, and yet decrees have been made without objection.

Nevertheless, whenever the attention of the Court has been drawn to the subject, such suits have always been considered to be the suits of the husbands, and to be instituted and prosecuted by them, and under their influence. The husband having the power to use his wife's name, may file the bill without her knowledge, and may prosecute it in a manner not favourable to her interests. If the wife's claim be not of a liquidated or specific sum, but of a sum to be ascertained by an account, though the Court might, and certainly would, protect her in the enjoyment of the sum recovered upon the account, that sum might not be the just amount of her right, because the account taken under the proceedings may not have been properly taken ; and if the principle be as I think it is in those cases, that the wife is as to her separate estate entitled to prosecute the suit by her own authority, independently of her husband, there seems to be no reason why a suit instituted by her husband should bind her ; why she may not at any time institute a new suit for the same matter by her next friend ; or why a decree (not being a decree for a specific sum, secured by the Court for her separate use, and there being no evidence, that it was prosecuted with her consent and authority,) should be a bar to a new suit, instituted by her next friend.

It is true, as was stated by Sir John Leach, in *Smyth v. Myers*, that the husband, by joining the wife as a co-plain-

(9) Gilb. 36 ; s. c. Prec. in Chanc. 376.

(10) Buob. 310.

(11) 2 Ves. sen. 432.

(12) 8 Ves. 183.

tiff, admits that the property sought to be recovered or secured is the separate property of the wife; but the wife appears to be further entitled to have the amount of the sum to be recovered or secured ascertained by a proceeding of her own, independently of her husband, and the party sought to be charged is entitled to be protected against a subsequent independent claim of the wife; and in the subsequent cause of *Hughes v. Evans*, Sir John Leach, upon the authorities of *Griffith v. Hood* and *Paulet v. Delaval*, there cited to him, stated, that where the husband and wife join in the suit as plaintiffs, or answer as co-defendants, it is to be considered as the suit or defence of the husband alone, and that it will not prejudice a future claim by the wife, in respect of her separate estate; and on that opinion he acted in *Reeve v. Dalby*.

It was argued, that these authorities do not apply to cases in which there is no dispute between husband and wife; but in considering them, I think that they do not admit of that limitation, and it is necessary to regard the interests of all parties—not only ought the wife to be protected in the enjoyment of her separate property, but the parties also who are sued ought to be protected against concurrent or consecutive demands of the husband suing in the names of himself and his wife, and of the wife suing by her next friend. If such suits were allowed, it is obvious that great oppression might be practised by the husband and wife acting in concert together.

It is, I presume, for reasons of this nature, that the Vice Chancellor has, in several instances, the notes of some of which I have seen, made orders to amend bills filed by the husband and wife, for the separate estate of the wife, by making the husband a defendant, and inserting the name of a next friend for the wife as plaintiff; and in the case of *Sigel v. Phelps*, he intimated his intention to dismiss the bill, if the defendants would not consent to a decree; and it is for the same reason that I have, though I admit with reluctance, come to the conclusion, that I ought to allow this demurrer:—I say, with reluctance, because I think that suits thus constituted are of familiar occurrence, and I am aware that many decrees have been made in such suits, without any inconve-

nience arising. I think, also, that in cases in which the husband and wife are not hostile, very little, if any, additional security is obtained for the wife, by the appointment of a next friend, the probability being, that in such cases the next friend is appointed by the wife on the recommendation of the husband. If a bill, by husband and wife, for the wife's separate estate, were brought to a hearing, if the separate estate consisted of a specific sum recovered and payable, and capable of being secured to the separate use of the wife, I should think that a decree ought to be made; and in many other cases I apprehend, that, with no more attention than the Court owes to the suitors, effectual means might be employed to ascertain whether the suit was carried on with the free consent of the wife, and to secure the defendant from any further claims on her part. But, confining myself to the present case, in which my attention must be exclusively directed to the statements made in the bill, in which the objection is made by the defendants at the earliest period in the cause; and in which the separate estate of the wife partly consists of a sum to be ascertained by account, I think myself bound to give effect to the objection. I, therefore, allow the demurrer; but I think that no costs should be given; and I give leave to amend, by striking out the name of Mr. Wake as plaintiff, and as next friend of his infant children, and making him a defendant, and by inserting the name of a next friend to the wife and infant children.

L.C. }
Jan. 24, 27, 31. } STUBBS v. SARGON.

Devise—Will—Construction—Trust.

A testatrix devised a copyhold messuage, with the furniture therein, to trustees, "upon trust, to pay the rents, issues, and profits of the said hereditaments to A. for life for her separate use," but the testatrix declared no trusts of the furniture:—Held, that A. was not beneficially interested in the furniture.

A devise "amongst my partners, who shall be in co-partnership with me at the time of my decease, or to whom I may have disposed of my business," is a good devise,

although the devisees may be afterwards constituted by an act requiring none of the solemnities necessary under the Statute of Frauds.

A testatrix indorsed a note of hand to A. B., a married woman, and inclosed it in a letter to her, stating, that she had given it to A. B. for her sole use and benefit, independent of her husband, for the express purpose of enabling her to present to either branch of her family any portion thereof as A. B. might consider prudent; and in the event of A. B.'s death, she empowered her to dispose thereof, by will or deed, to those, or either branch of the family she might consider most deserving thereof:—Held, that A. B. took on trust, and not beneficially.

This was an appeal from the decision of the Master of the Rolls, which will be found reported in the 6 Law J. Rep. (N.S.) Chanc. 254.

Sir C. Wetherell, in support of Mrs. Sargon's appeal.

Mr. Tinney, Mr. Wakefield, Mr. Temple, Mr. Bethell, Mr. Teed, Mr. Richards, and several other counsel, on behalf of the numerous parties to the suit.

The following cases were cited:—

Habergham v. Vincent, 4 Bro. C.C. 353.

Rose v. Cuninghame, 12 Ves. 29.

Whytall v. Kay, 2 Myl. & K. 765; s. c.

3 Law J. Rep. (N.S.) Chanc. 94.

Meredith v. Heneage, 1 Sim. 542.

Benson v. Whittam, 5 Sim. 22.

Curtis v. Rippon, 5 Mad. 434.

Sale v. Moore, 1 Sim. 534.

Sandford v. Raikes, 1 Mer. 646.

Wood v. Cox, 2 Myl. & C. 684; s. c.

5 Law J. Rep. (N.S.) Chanc. 561,

6 *ibid.* 185, 366.

Jan. 31.—The LORD CHANCELLOR.—There were three questions raised on this appeal.

The first was, whether the furniture and effects in the copyhold premises were bequeathed, with the copyhold premises, for the benefit of the parties to whom the copyhold premises were devised; and I think that they were not. They are included in the gift to the trustees, but the trusts are declared only of the hereditaments, and of the rents, issues, and profits thereof; and the power of sale is given,

not to the personal representatives, but to the heirs and assigns of the survivors of the trustees. It is true, that in one part of the will, the words "hereditaments and premises" are used, but that is after the word "hereditaments" has, in more instances than one, been used by itself. It is probable that the testatrix intended the furniture and effects should accompany the copyholds, but she has omitted to declare such to be her intention. I am, therefore, of opinion, that they are not included in the gift.

The second question is, whether the ultimate devise of the premises in Little Queen Street, and other premises, is void under the Statute of Frauds, or for uncertainty. This point was pressed with much earnestness at the bar; and it is out of deference to the earnestness of counsel that I have paid more attention to this question than I should have thought it necessary to do from any difficulty I have felt on the point itself. The devise is to trustees to keep the premises in repair, and insure them, and, subject thereto, to pay the rents to the testatrix's sister, Mary Innell, during her life, and after her decease, in trust, to dispose of and divide the same unto and amongst her partners, who should be in co-partnership with her at the time of her decease, or to whom she might have disposed of her business, in such shares and proportions as the trustees should think fit or deem advisable. She gave her stock in trade to her executors to sell, but with liberty to the partner or partners who should be entitled to her freehold premises under her will to purchase the same at a valuation. She gave the residue of her personal estate amongst certain of her nephews and nieces, but provided, that such of her nephews as should be entitled to any beneficial interest under her will, should have only one-half of the share of the others.

Upon the first head of objection, namely, the Statute of Frauds, it was argued, that the will contained no disposition of itself, but that it was a reservation to the testatrix of the power of completing the devise by investing the intended devisee with the character described in the will, and that *Habergham v. Vincent* was in point in support of that proposition. The difference between the two cases is, that the will in

Habergham v. Vincent contained no devise of the remainder. It only declared, that the remainder should be for such person, or for such estate, as the testatrix should by deed or any instrument attested by two witnesses appoint. This was no disposition of the property, but a reservation by the will, inoperative till the testator's death, to dispose in his lifetime by an instrument not attested according to the Statute of Frauds. In the present case, the disposition is complete; the devisee, indeed, is to be ascertained by a description contained in the will; but such is the case with many unquestioned devises. A devise to a second or third son, perhaps unborn at the time, many contingent devises and shifting clauses, are instances of devises to devisees who are to be ascertained by future events and contingencies; but such person may be ascertained not only by future events and contingencies, but by the act of third persons. Suppose a father had two sons, and that a relation had a power of appointing an estate to one of them, that the father made his will, devising his own estate to such one as should not be appointee of the other estate, or with a shifting clause; there, the act of the donee of the power is to decide who shall take the father's estate; but there is nothing in the Statute of Frauds to prevent that, because the devise by the will is complete, that is, the disposition is complete; the intention is fully declared, though the object to take remains uncertain. If the subsequent act removing that uncertainty, and fixing the identity of the devisee were to be considered as testamentary in the case above referred to, the donee of the power would be making or completing the will of the father, that is, one man would be making another man's will. The act, therefore, is not considered as testamentary; and if not, why should not that act be the act of the testator himself? It is objected to upon the ground of its being testamentary; but if it be not testamentary when done by a stranger, it cannot be so when done by the testator. If it were otherwise, a testator could not devise lands, nor give legacies charged upon lands, to such person as might be his wife at his death, to such children as should be born, or to such servants as he might have in his service

at his death. The cases of charging legacies generally by the will, and naming the legatees by an unattested instrument, carry the principle to the greatest length, because the subsequent act ascertaining the party to take, is also testamentary; but the rule is recognized by Lord Rosslyn, in *Habergham v. Vincent*; and in *Rose v. Cunynghame*, Sir William Grant explains it upon the principle I have alluded to. He says, "that where the will, duly executed, charges legacies, it is only necessary to shew that there is a legacy; the moment that character is shewn to belong to the demand, you shew that it is already charged upon the land." His decision in that case marks the distinction; for the testator did not charge his legacies by his will, and create the legatees by a codicil, but he devised his estate to pay such legacies as he should give by any codicil, whether witnessed or not; and afterwards by an unattested codicil he attempted to charge legacies upon the estate; Sir William Grant held he could not do so, because not only was the legatee to be found in the codicil, but the will to make the charge, that not being found in the will, I think, therefore, that the objection upon the ground of the Statute of Frauds cannot be supported.

Then, as to the uncertainty: I think the facts stated in the Master's report clearly bring the parties within the description in the will. The testatrix, being desirous of herself retiring from business, and having nephews and nieces, some of whom had been her partners, gives up the business to four, some of whom had been her partners, and others, whom she had then introduced, and gives to the four the stock in trade, to the amount of 1,000*l.*, and by circulars introduces to her former connexions these four persons, whom she calls her successors. These certainly are the persons to whom she had disposed of her business, within the meaning of the will.

Another question remains, of more difficulty, namely, the 2,000*l.* This was due upon a promissory note of other persons. The testatrix specially indorsed it to Sarah Sargon, a married woman, for her sole use and benefit, independent of her husband, for the express purpose of enabling her to present to either branch of the testatrix's

family any portion of the principal or interest thereof, as she might consider most prudent. It was not contended, that this constituted a trust which could be executed, so that the *cestuis que trust* could claim the benefit. It was therefore either an absolute gift to Mrs. Sargon, or being for a purpose which fails, it reverts to the original owner, and so constitutes part of her estate. If it had not been for the words "her sole use and benefit," there would have been, no doubt, an assignment for the express purpose of enabling the assignee to dispose of it among the testatrix's own relations, and it would hardly be contended to be a gift for her own benefit. It is to be observed, that the words are not for her "own use and benefit," as in the case of *Wood v. Cox*, which was referred to, but for her sole use and benefit independent of her husband, apparently meaning not to describe an extent or quality of beneficial interest, but intending to mark the character in which the donee was to hold the property, namely, as a feme sole, and not as dependent on her husband. The latter part of the paper strongly confirms the character of trust, which, I think, belongs to the part I have already considered. It provides, that in the event of the death of Mrs. Sargon, the author of the gift empowers her to dispose of the said sum of 2,000*l.* and interest, by will or deed to those of either branch of her family she might consider most deserving. If the gift had been intended for the benefit of Mrs. Sargon, with only an intimation of a wish in favour of others, not amounting to a trust, this power to dispose of it, by deed or will, was wholly useless, being a necessary incident to the gift itself; but if Mrs. Sargon was to be the mere donee of a discretionary power in favour of others, the mere depositary of a discretion to be personally exercised, then it was natural and proper to specify that such power and discretion might be exercised by deed or will. I thought that the gift in *Wood v. Cox* was not a gift upon trust, but a gift subject to a charge. This, on the contrary, I think is a gift upon trust, and that, the trust failing, it constitutes part of the testator's estate.

The revoked codicil of 1829, stated in the report, cannot, I think, be used for the

purpose of construing this instrument of 1833.

The result is, that I concur as to all the points objected to in the judgment of the Master of the Rolls. The petition of appeal must therefore be dismissed, with costs.

V.C. }
Jan. 16. } GREENAWAY v. ROTHERHAM.

Practice.—Pleading—Next Friend.

In a suit by a husband and wife, and their infant children suing by their father as next friend, for the recovery of property, in which the wife had a separate interest for life, with remainder to her children, the husband went abroad, after a decree had been made to account, and abandoned the suit:—Held, that the Court had not authority on a petition presented by the wife, to appoint a next friend for the wife, and a new next friend for the infants; but the Court ordered that a person to be named by the petitioner should be at liberty to prosecute the suit for the benefit of the wife and children.

This was a suit for some property, in which a married woman was interested for her separate use for life, with remainder to her children. The plaintiffs were the husband and wife, and their infant children suing by their father as next friend. After a decree had been made for an account, the husband went abroad, and did not continue the prosecution of the suit. A petition was now presented by the wife, praying to have a next friend appointed to prosecute the suit for her, and to have a new next friend for the infants.

The VICE CHANCELLOR held that he had no authority to make such an order as was asked for; but he said he would make an order that some person, to be named by the petitioner, should be at liberty to prosecute the suit for the plaintiffs, without prejudice to any lien of the husband's solicitor, in case the plaintiffs adopted the suit.

Mr. W. J. C. Keen appeared for the husband.

M.R.
 Nov. 21, 22, 23, } EARL OF WINCHELSEA v.
 1837. } GARRETTY.
 Jan. 29, 1838. }

International Law—Heir—Administration—Real and Personal Assets.

Where a person domiciled in one country dies possessed of property situate in another, the personal estate is to be applied and administered according to the law of the place of domicile, and the real estate according to the law of the place where the real estate is situate.

By the law of Scotland, all creditors may obtain payment out of real or personal estate; but if the executors have paid heritable debts, they are entitled to relief against the heir; and if the heir has paid moveable debts, he is entitled to relief against the executors.

As to heritable debts, in respect of which there is no right of relief against the executors, the Scotch heir, in respect of the assets of a person domiciled in England, is not entitled to the benefit of English law, which makes the personal estate primarily liable for the payment of all debts.

But where a Scotch heir has paid the moveable debts of the deceased, who died domiciled in England, it was held, he was entitled to be repaid out of the personalty in England.

The facts of this case, which came on for argument, upon exceptions to the Master's report, are fully stated in the judgment of the Master of the Rolls.

Mr. Pemberton, Mr. Richards, and Mr. Hope, supported the exceptions.

Mr. Tinney and Mr. Everett, contra.

The following authorities were cited:—

Robertson on Personal Succession.

Balfour v. Scott, 6 Bro. P.C. 550.

Drummond v. Drummond, 6 Bro. P.C. 601.

Brodie v. Barry, 2 Ves. & Bea. 127.

Melan v. Fitzjames, 1 Bos. & Pul. 142.

De la Vega v. Vianna, 1 B. & Ad. 284;
 s. c. 8 Law J. Rep. K.B. 388.

Dalrymple v. Dalrymple, 2 Hag. Const. R. 54.

Erskine's Institute of the Law of Scotland, tit. 'Succession,' 'Moveables.'

Wright's Tenures, 29, 153, 168.

NEW SERIES, VII.—CHANC.

Roberts v. Walker, 1 Russ. & Myl. 752.

Attorney General v. Stewart, 2 Mer. 143.

Anonymous, 9 Mod. 66.

Storey on the Conflict of Laws, ss. 442, 528.

Elliott v. Minto, 6 Mad. 16.

The Master of the Rolls reserved his judgment.

THE MASTER OF THE ROLLS.—This case came on upon exceptions to the Master's report; and the question argued was, whether the debts of Lady Mary Ker, which had been paid by her co-heirs, out of her real estate in Scotland, ought to be repaid to them out of her personal estate administered in England.

Lady Mary Ker, and her sister Lady Essex Ker, as the co-heiresses of the Duke of Roxburgh, were entitled to certain real estates in Scotland. They were domiciled in England, contracted debts there, and executed joint and several bonds for securing the payment of those debts. In March 1818, Lady Mary Ker died intestate. Her sister, Lady Essex Ker, was her heiress-at-law, and her administratrix. She entered, as she was entitled to do, on the Scotch estates, but did not make up her title to them according to the forms required by the law of Scotland. In 1819, Lady Essex Ker executed a deed of disposition, and a will, and she intended to dispose of the Scotch real estates, which had descended to her from Lady Mary Ker; but as she had not made up her title to those estates, the same were after her death, in September 1819, claimed by the co-heirs of Lady Mary Ker, who finally established their title by a decision in the House of Lords.

Lady Mary and Lady Essex Ker had personal estate in England; and when Lady Essex Ker died, there were joint and several bonds of Lady Mary Ker and of Lady Essex Ker then remaining unpaid. The will of Lady Essex Ker was proved by the late Earl of Winchelsea and Sir Robert Williams Vaughan, two of the residuary legatees, and they filed a bill against another residuary legatee, against the Attorney General, as representing charities, and against the co-heirs, for the establishment of the will and the due administration of the estate of Lady Essex Ker.

P

During the pendency of this suit, some of the bond creditors of Lady Mary and Lady Essex commenced proceedings in Scotland, to recover payment of their demands, against the co-heirs of Lady Mary Ker; and thereupon the co-heirs filed their bill in this court, against the executors of Lady Essex Ker, who had possessed the personal estate of Lady Mary Ker, praying an account, and the due administration of that estate, and the estate of Lady Essex, and that the same estate might be applied in discharge of the debts of Lady Mary Ker and Lady Essex Ker, as were by the law of Scotland, of the nature of moveable debts, and primarily chargeable, as between real and personal representatives, upon the personal estate; and in and for relieving the heirs, and that the heirs might have the benefit of the suit instituted by the Earl of Winchelsea and Sir Robert Williams Vaughan.

The causes were heard together, on the 13th of June 1825, and by the decree it was ordered, that the Master should take an account of the personal estate of Lady Essex Ker, and of her debts and legacies; and also an account of the personal estate of Lady Mary Ker coming to the hands of Lady Essex; and the Master was to inquire of what real estates Lady Essex Ker died seised, and which of such estates passed by her will and such deed of disposition, and whether, by the law of Scotland, there was a distinction between heritable and moveable debts, as to the payment out of the debtor's real and personal assets, and whether, by the law of Scotland, any creditors claiming heritable or moveable debts, being paid out of the debtor's real estate in Scotland, or by the heir or person entitled to such real estate, the heir or person entitled to such real estate was entitled to be repaid the amount out of the personal estate, regard being had to the domicile of the debtor; and if the Master should find such right to exist by the law of Scotland, he was to inquire what debts of that nature had been proved against, or paid out of the proceeds of the several estates in Scotland of Lady Mary Ker and Lady Essex Ker, or by the heir, or to which the said respective estates in Scotland were liable.

In the course of the proceedings by the

creditors in Scotland, and in August 1828, being three years after the date of the decree, an agreement was entered into between the heirs of Lady Mary Ker and Sir Robert W. Vaughan, for the sale of the Scotch estates, which were accordingly sold, and a sufficient portion of the purchase-money was applied in payment of the joint and several debts; but by such agreement, the parties reserved their mutual claims of relief in relation thereto, and in 1833, the co-heirs commenced an action of relief in the Court of Session in Scotland, against Sir Robert W. Vaughan, the surviving representative of the Ladies Ker, and insisted that, by the law of Scotland, he was bound to relieve the heirs of Lady Mary Ker in respect of the personal debts paid by them; and, therefore, prayed that he might pay to them one-half of the sum which had been paid out of the proceeds of the real estate, in satisfaction of the joint debts; and it being objected, that the heirs were not entitled to the relief prayed, because Lady Mary Ker died domiciled in England, the Lord Ordinary, in February 1834, directed a case to be submitted to the opinion of English counsel, who, on the case stated, gave it as their opinion, that "the Scotch heirs were entitled as against the executor and residuary legatee of the personal estate, to claim from it exoneration from the debts or indemnity against them to their whole extent; but not so as to disappoint or prejudice any legatee not being a residuary legatee." In consideration of this opinion, and on the 11th of June 1834, the Lord Ordinary found Sir Robert W. Vaughan liable to relief, and directed payment to the heirs of the debts as libelled, so far as they were personal, to the extent of the executory funds of Lady Mary Ker, intermitted with by Lady Essex Ker and Sir Robert W. Vaughan; and it afterwards appearing there was a balance of 14,994*l.* 3*s.* 0*d.*, arising from Lady Mary Ker's English estates, and that the claims of the heirs against that estate exceeded that sum, the Court of Session, on the 11th of March 1835, decreed against Sir Robert W. Vaughan, for the payment of the whole of the admitted balance to the heirs.

Before the action for relief in Scotland was brought, and in 1827, the opinion of Mr. George Joseph Bell was asked, on the

questions of Scotch law, which were mentioned in the English decree, and Mr. Bell's opinion is set forth at length in the Master's report; and after the termination of proceedings in Scotland, a further opinion was obtained from the same Mr. Bell, and other opinions from the Lord Advocate, Mr. Currie, and Mr. Maitland; and in conformity with their opinions, the Master has found, by his separate report, that by the law of Scotland, there is a distinction between heritable and moveable debts, as to payment out of the debtor's real and personal assets; and that, by the law of Scotland, creditors claiming moveable debts, being paid out of the debtor's real estate in Scotland, or by the heir or person entitled to such real estate, the heir or person entitled to such real estate is entitled to be repaid the amount out of the personal estate, as the Master has said, "regard being had to the domicile of the debtor;" but as the parties have, by the agreement, agreed it should be taken, regard being had to the fact, that the debtor was domiciled in England.

To this report, Sir Robert Williams Vaughan, the surviving executor, excepted, on the ground, that insufficient evidence was produced to the Master as to the law of Scotland, in respect of the matters directed to be inquired after by the decree.

There are some propositions relating or supposed to relate to the questions in this cause, as to which the parties do not differ. It is a general rule, that when a person domiciled in one country dies possessed of property situate in another, the personal estate is to be applied and administered according to the law of the place of domicile, and the real estate is to be applied and administered according to the law of the place where the real estate is situate. By the law of Scotland, there is a distinction between heritable and moveable debts, as to the payment out of the debtor's real and personal assets: and if the debtor was domiciled in Scotland, any creditor claiming moveable debts being paid out of the debtor's real estate in Scotland, or by the person or heir entitled to the real estate, he is entitled to be repaid the amount out of the personal estate. By the law of Scotland, all creditors may obtain payment out

of either the real or personal estate; but if the executors have paid heritable debts, they are entitled to relief against the heir, and if the heir has paid moveable debts, he is entitled to relief against the executors.

The question in this case arose on the fact, that here the debtor was not domiciled in Scotland, but in England; and it was argued, both as a question of general law, and as a question on the principles of Scotch law.

From the inquiry directed by the decree, it seems this Court considered the question was to be determined by the law of Scotland; and from the inquiry directed by the Lord Ordinary, in the relief suit in Scotland, it seems the Lord Ordinary considered the question was to be determined by the law of England.

By the law of England, the personal estate is the primary fund for the payment of all debts contracted by the deceased person whose estate it was. By the law of Scotland, moveable debts are primarily and properly chargeable on the personal estate. The creditors may, indeed, enforce payment against the real estate in the hands of the heir; but if he does so, the heir is entitled to relief, as against the executors out of the personal estate. In other words, according to the law of Scotland, the real estate, though subject to the payment of moveable debts, is only a subsidiary fund for the purpose of payment. Payment by the heir does not extinguish the debt, but vests in him a right to recover the amount against the personal estate, and so far constitutes him the creditor against the personal estate. But whether he can enforce payment against the personal estate, which is to be distributed according to the law of another country, which makes the personal estate the primary fund for the payment of debts, is the question here.

Prima facie there would seem to be no difficulty. The heir having, by the law of the country in which the land lies, a right to relief and exoneration, would seem to be at liberty to make that right available in any country where the personal estate is the primary fund for the payment of all debts. But it is objected, that in all the opinions on which the finding of the Master rests, it has been assumed, that the law of domicile makes no difference, whereas

it is clear, the domicile determines the law by which the personal estate is to be distributed; and that, although it be true in England, the personal estate is applied in exoneration of the English heir of real estate; yet the right of the heir to be exonerated is founded on the law peculiar to England, and that a foreign heir of foreign lands is not entitled to the same relief as an English heir of English lands. The law of England, it is said, affords no relief out of English personal assets; and although the law of Scotland regulates the administration of real estate, and provides that the real estate when applied in payment of personal debts, shall be exonerated out of the personal estate, yet the proposition must be limited to personal estate of which the distribution is regulated according to the law of Scotland; and, consequently, to the personal estate of debtors domiciled in Scotland.

Several cases were cited that sufficiently establish the propositions not disputed on either side; and *Drummond v. Drummond* (1) establishes, that a Scotch heir is ultimately liable to pay heritable debts, which have, in the first instance, been paid out of the personal estate distributable according to the law of Scotland; but no case has occurred in which it has been decided, that the Scotch heir having paid moveable debts, is entitled to be repaid out of the personal estate, distributable according to the law of England; and that is the question here.

The personal estate is taken by the administrator according to the law of England, subject to the payment of all the debts of the intestate. The estate is taken by the heir according to the law of Scotland, subject to the payment of all moveable debts; but with a right to relief out of the personal estate, and subject to the payment of all heritable debts, without such right of relief. As to heritable debts, in respect of which there is no such right of relief, the heir is not entitled to the benefit of the English law, which makes the personal estate subject to the payment of all debts. The Scotch law, which makes the heir ultimately liable to the payment of such debts, and which governs the distribution of the real estate, prevails in favour of the person

entitled to the personal estate distributable according to the law of England. As to personal debts, in respect of which there is such right to relief, the English law subjects the personal estate to all debts; the Scotch law relieves the real estate, as far as it can, consistently, with the claims of the creditors. The heir, by paying personal debts, satisfies the creditor; but, at the same time, acquires for himself a right of demand against the executor. He may, if he pleases, take an assignation of that debt, and make it available; but that is not the principle, because, without any assignation, his own claim to relief subsists, and constitutes him a creditor against the personal estate.

Under these circumstances, the question does not appear to me to be fully stated; when it is said to be, whether a foreign heir of foreign land is entitled to the same relief as an English heir of English land.

The case is, that the foreign heir of foreign land is, in respect to these lands, subsidiarily liable to pay debts to which the personal estate, as distributable according to the law of that country; and under these circumstances it is, and without reference to English tenures, or the title to exoneration, which an English heir may have, that the question arises, whether the person who, by the law of a foreign country, is constituted surety for the payment of debts primarily liable and chargeable on another fund, and paying the debts by force of, and according to the law of that country, which constitutes him a creditor on that other fund, is or is not entitled to make his title as creditor available in another country, where the personal estate is distributable, and where the law makes the personal estate primarily liable for the payment of all debts.

On the best consideration I have been able to give to this case, I am of opinion, that the right of relief or demand against the personal estate, which, in the administration of real estate by the law of Scotland, is vested in the heir who has paid moveable debts, is capable of being made available in England, where the personal estate is the primary fund available for the payment of all debts.

In this case, the personal estate seems to have been principally, if not wholly, situate in England; but whether in Eng-

(1) 6 Bro. P.C. 601.

land or Scotland, it was by reason of the domicile to be administered according to the law of England; and it was with reference to this that the Judges of the Court of Session asked the opinion of English lawyers, in the relief suit; and relying on that decision, and the several opinions set forth in the report, it does not appear to me, the evidence before the Master was not sufficient to support the conclusion to which he has arrived.

I am, therefore, of opinion, that the exception must be overruled; and that, upon the petition, the report must be confirmed; and, I think, an order should be made for the application of the personal estate of Lady Mary Ker, in satisfaction of her share of personal debts, which have been paid out of the proceeds of the real estate in Scotland, and the amount, if not already ascertained, ought to be ascertained by proper inquiry before the Master. The argument having been employed upon the question of right, nothing was said on the details; and without further assistance from the bar, I am unable to state whether the sums were correctly set forth in the petition or not.

M.R.

Dec. 9, 1837. }
Jan. 23, 1838. } GODSALL v. WEBB.

Settlement—Construction—Next-of-kin.

By a marriage settlement, some property, to the principal part of which the intended wife was entitled for life, was conveyed to trustees for her separate use, and it was agreed that the trustees should effect an insurance on her life, and pay the premium out of the trust money, and should invest the amount assured when received, and pay the dividends to the intended husband for life; and after his decease, pay as the wife should appoint, and, in default, to the persons entitled under the Statute of Distribution of intestate's estates. The wife survived her husband:—Held, that she had then a right to refuse to keep up the policy; and that this Court would not consider her bound to perform the agreement for the benefit of mere volunteers.

The object of the bill in this case was, to obtain the declaration of the Court as

to the rights of the parties to a sum of 6,570*l.*, received by the plaintiff from the Equitable Assurance Office. It was claimed by the plaintiff, by the next-of-kin of Mary Martin deceased, and by her legal personal representative and residuary legatee, under the following circumstances:—

Mr. Procter, the first husband of Mrs. Mary Martin, devised and bequeathed certain real and personal estates to her for life. Being entitled to her life interest, and also to a sum of 400*l.*, 3*l.* per cent. annuities, she executed a settlement, in contemplation of her marriage, afterwards solemnized, with John Martin. The settlement, dated the 3rd of February 1808, was made between Mary Martin, by her then name of Mary Procter, of the first part; John Martin, of the second part; and Thomas Brown and Henry Fowke, of the third part; and after reciting the will and codicil of Mr. Procter, it recited, that a marriage was intended to be solemnized between John Martin and Mary Procter, and that on the treaty for the same, it had been agreed that the real estate to which she was entitled for life, and the interest for life, in a sum of 4,500*l.*, and the sum of 400*l.*, 3*l.* per cents., and also certain furniture and effects, should be vested in Brown and Fowke, on the trusts afterwards declared of the same, "for the sole use and separate benefit of Mary Procter;" it was witnessed, that in pursuance of the agreement of marriage, and in consideration thereof, and for making a certain provision for Mary Procter, during the continuance thereof, and for a nominal consideration, Mary Procter conveyed and assigned the interest therein described, to the trustees on trust for her separate use, after the marriage. And as to the 400*l.*, 3*l.* per cents., the trustees were to hold the same on trust, for such persons as she should by any writing or by her will appoint; and to pay the income of the trust funded property, as she should appoint, and in default of appointment for her separate use; and if she made any savings, the same were to be invested as she should think proper, and held on the like trusts; and if any part of the income, or the 400*l.*, 3*l.* per cents., should be undisposed of at her death, and there should be no issue of the marriage, the trustees were to pay the

same, as she should appoint, and in default of appointment, "to such person or persons as would have been entitled thereto as her next-of-kin, at the time of her decease, and such default of issue, as aforesaid, under the Statute for the Distribution of intestate's personal effects, if she, the said Mary Procter had then died sole and intestate, to the utter exclusion of John Martin;" and after the several clauses thus very inaccurately expressed, there followed the clause on which the question arose:—"and it is further agreed between the said Mary Procter and John Martin, that Brown and Fowke shall, within two calendar months after the solemnization of the intended marriage, make an assurance upon the life of the said Mary Procter, for the sum of 3,000*l.*, in the Equitable Assurance Office; and that when the assurance shall be effected in their names, they the said Brown and Fowke, &c. shall annually pay out of the said trust money, the regulated premium of assurance for and during the life of the said Mary Procter, and stand possessed of the said assurance, in trust from and after the decease of the said Mary Procter, and when the said assurance office shall have paid the said sum of 3,000*l.*, to place out the said sum of 3,000*l.* at interest upon real or government security, and to pay the interest or dividends thereof to John Martin for his life, if he should survive the said Mary Procter; and from and after his decease, in trust to pay the sum of 3,000*l.* to such person or persons, and in such way or manner as the said Mary Procter shall by her last will and testament, attested by two witnesses or more, direct or appoint; and in default of such will, to pay the 3,000*l.* to the persons entitled under the Statute of Distribution of intestate's personal estate," with power to Mary Procter, if she should please, by her will, to give and bequeath the said 3,000*l.*, or any part thereof, to her said then intended husband, John Martin, if he should survive her.

There was no issue of the marriage, and in March 1817 John Martin died, leaving Mary Martin, his widow, surviving him; and soon afterwards, with the concurrence of Fowke, the surviving trustee, she disposed of the policy to her cousin Philip

Godsall, the plaintiff's father; and by an indenture of assignment, dated the 8th of April 1817, and made between Henry Fowke, of the first part; Mary Martin, of the second part; and Philip Godsall, of the third part, whereby, after reciting the settlement on the marriage, the effecting of the policy, and the death of John Martin, whereby (it was stated) the intent and purpose of making and effecting the assurance for a provision for the said John Martin, in case he should have survived the said Mary Martin, had determined and ceased, and further reciting, that Ann, the wife of Philip Godsall, was her sister, and Philip Godsall himself, her cousin, and that in consequence of the decease of John Martin, Mary Martin was unwilling any longer to continue the said assurance, and to pay the annual sum to grow due from time to time, as the premium for the same, and had proposed to Godsall to assign or cause to be assigned the same policy of assurance to him, which he, Godsall, had agreed to accept, and had accordingly paid or agreed to pay unto the said Equitable Assurance Office, the sum of 144*l.* 13*s.*, for the premium thereon, due on the 1st of April, then instant, it was witnessed, that for the considerations therein mentioned, Fowke, at the request of Mary Martin, assigned the policy to Philip Godsall. Under this assignment, Godsall possessed the policy, and during his life continued to pay the premium; he died in 1826, having made the plaintiff, who was now his legal personal representative, his residuary legatee.

The plaintiff continued to pay the premium till the death of Mary Martin, which happened in 1835, and after her death he received 6,570*l.*, which was the sum due on the policy, and he treated it as his own; but a doubt being suggested, whether there was not a trust of the policy for the next-of-kin of Mrs. Mary Martin, he gave notice to them, and to her executors, and filed this bill to have the right declared.

For the plaintiff, it was alleged, that after the death of Mr. Martin, the only object for which the assurance had been made, namely, a provision for Mr. Martin for his life, if he survived her, ceased; that the payment of the premium, by which the assurance was kept up, was the result of, and in consequence of a mere agreement

between the husband and wife, which they might have abandoned during their joint lives, if they had thought fit; that after the death of the husband, the wife was at liberty to keep up or abandon the policy at her pleasure; she was unwilling to keep it up, and having a right to discontinue payment of the premium, and maintaining the policy, she had also a right to assign the policy to Mr. Godsall, and to give him the option, if he thought fit, of keeping it up for his own benefit.

For the next-of-kin, it was alleged, that the settlement contained an absolute declaration of trust for them, subject only to the power Mrs. Martin had, which was not exercised, to dispose of the money due on the policy by her will. That after the death of Mr. Martin, the trustees were bound to apply a sufficient part of the income of the trust fund, in keeping up the payment of the annual premium; and the neglect to do so, was a breach of trust; and on those grounds, the next-of-kin claimed the whole sum due on the policy, without allowing anything for the premiums paid.

For the legal personal representatives and residuary legatees, it was alleged, that the will of Mrs. Martin might be so construed as to amount to an appointment of the money, or if not, the money ought to be considered as a part of her general personal estate passing by her will.

Mr. Pemberton, Mr. Barber, and Mr. Walford, for the plaintiff—

Johnson v. Legard, 1 Turn. & Rus. 281.

Sutton v. Chetwyn, 3 Mer. 249.

Darlington v. Sutton, House of Lords, unreported. See 1 Ll. & G. 343; and 2 Keen, 93.

Woodcock v. the Duke of Dorset, 3 Bro. C.C. 569; s. c. 3 Ves. 299.

Langham v. Nenny, 3 Ves. 467.

Calthorpe v. Gough, 3 Bro. C.C. 394, n.

Bulmer v. Jay, 4 Sim. 48.

Hankins v. Hawkins, 7 Sim. 173; s. c. 4 Law J. Rep. (n.s.) Chanc. 9.

Edwards v. Jones, 1 M. & Cr. 226; s. c. 4 Law J. Rep. (n.s.) Chanc. 163.

Mr. Spence for the personal representatives of Mrs. Martin.

Mr. Tinney and Mr. Piggot, for the next-of-kin, cited—

Ex parte Pye, 18 Ves. 140.

Colgear v. Mulgrave, 2 Keen, 81; s. c.

5 Law J. Rep. (n.s.) Chanc. 335.

Sloane v. Cadogan, 2 Sug. Vend. 370.

Jones v. Croucher, 1 Sim. & Stu. 315.

Arundell v. Arundell, 1 Myl. & K. 316;

s. c. 2 Law J. Rep. (n.s.) Chanc. 77.

Anderson v. Dawson, 15 Ves. 532.

Courtenay v. Ferrers, 1 Sim. 137; s. c.

5 Law J. Rep. Chanc. 107.

Fortescue v. Barnett, 3 Myl. & K. 36;

s. c. 2 Law J. Rep. (n.s.) Chanc. 98;

3 *ibid.* 106.

The MASTER OF THE ROLLS [after stating the circumstances of the case, proceeded:—] I am of opinion, that the policy cannot be considered as passing by the will of Mary Martin, or as forming part of her general personal estate. The question in the cause appears to me to lie entirely between the plaintiff in the cause and the next-of-kin of Mrs. Martin.

The only professed object in the settlement is, to secure the property of Mrs. Martin for her sole use and separate benefit, and to make a certain provision for her during the continuance of the coverture; and it was for that object alone, that she professed to assign the trust property to the trustees. The provision as to the policy shews, that besides that object, she intended to make a provision for her husband if he survived her; and this being an object not stated by the recital, we cannot, in this case, rely so much as in other cases on the recitals, as affording the means of interpreting the whole instrument; but the recital does indicate that which seems to me to be the intention, and it is by no means to be neglected.

In everything which does not relate to the policy, the provisions of the deed are in conformity with the object recited, and taking the clause relating to the policy, in connexion with the rest of the deed, the question is, whether the clause was intended to do more than to make a provision for the husband if he should survive the wife.

The next-of-kin contend, that besides making that provision for the husband, she has intentionally or otherwise made a declaration of trust for them, which can only be defeated by a testamentary ap-

pointment. The case of *Anderson v. Dawson*, which was relied on by the next-of-kin, differs considerably from the present. In that case, the fund was realized, and was actually in the hands of the trustees; the trusts were distinctly declared, and independent of any agreement, the trustees were bound by their duty to carry those trusts into execution. In the present case, the fund was not realized, it was to be realized and made available by acts to be done after the marriage, in pursuance of an agreement between the husband and wife, and to be continued during their joint lives, as the plaintiff says; but the words of the deed are, (as the next-of-kin contend,) during the life of the wife, whether she died in the lifetime of the husband or not.

There is a difficulty in saying, that the words, "during the life of the wife," shall be construed to mean during the joint lives of the husband and wife: but to do so, would be to act in accordance with the nature of the trust, and the clear and professed intention of the parties; and I think that there is still greater difficulty in saying that on the true construction of this instrument, the wife intended to create, and has created, a trust, not only against the husband if he survived her, but against herself if she survived, to continue the trust principally made to secure a certain provision for herself, during the continuance of the marriage against herself, and at her expense after the cessation of the coverture by her husband's death, for the purpose of realizing that fund of which she was to have no enjoyment, but which she might dispose of by will on her death, and which she could not dispose of otherwise than by will, and which, in default of appointment by will, might pass on her death to her next-of-kin, or to a subsequently taken husband. The trustees held the policy, and were the legal owners of it; they had by conveyances and assignments the life estate of the wife, and by agreement between the husband and wife, they were to pay the premium on the policy during the life of the wife, and if the husband had survived the wife, or if the wife surviving, had permitted the payments to be made, there would be no doubt as to the persons entitled now to the benefit of the policy.

But the whole provision is founded on the agreement between the husband and wife: except by stating the agreement to be so, there is no declaration of trust, and no covenant on the part of the trustees. The case appears to me to be a case of mixed trust and agreement, and looking at the whole of the settlement, I think the intention of the ultimate limitation in the clause in question, considered in connexion with the rest of the deed, was only to shew that the agreement was to exclude the husband from taking more than a life interest in the investment of the policy money; and from the nature of the clause, considered as an agreement, it was open to the husband and wife during their joint lives, or the wife alone, to alter that which was intended only to be for their mutual benefit (1). And it appears to me, if Fowke, the surviving trustee, had availed himself of his power as trustee, and had insisted on paying the premiums against the will of the widow, she might have compelled him to pay the whole income to her, and this Court would not have compelled her to fulfil the agreement for the benefit of mere volunteers.

Taking it, that she had a right to refuse to keep up the policy, or to permit the trustee to keep it up, I think the trustee was entitled to assign it according to her direction; and consequently it appears to me that the plaintiff is entitled to the fund in question.

M. R. }
Jan. 31. } BRIDGES v. BRAMFIL (2).

Practice.—*New Orders, 1837—Construction.*

The question arose on the second article of the ninth order (May 1837), as to where the application should be made.

Exceptions had been taken to the answer of the defendant Brookes, which the Master reported insufficient; Brookes excepted to the report, and these exceptions were heard before the Vice Chancellor, and disallowed. Subsequently, there was a special order, but without affidavit as to the sort of further answer which was to be put in.

(1) See *Colyear v. Milgrave*, 2 Keen, 81; s. c. 5 Law J. Rep. (N.S.) Chanc. 355.

(2) Ex relatione.

On the answer of the defendant Bramfil, a motion for the production of books and papers admitted by his answer was now made at the Rolls. This was resisted, on the ground that the order of the Vice Chancellor, which was the last, was necessarily an order upon merits, meaning not of the cause, but merits with reference to which the order was made.

Mr. G. Richards, for the plaintiff.

Mr. James Russell, for the defendant Bramfil.

The MASTER OF THE ROLLS held, that the case was within the order, and that he could not entertain the application.

V.C. }
Jan. 12. } MILBANKE V. STEVENS.

Practice.—Amendment—3 & 4 Will. 4. c. 94. s. 13, Construction of—Master.

Under the above-mentioned act, the Masters have the same jurisdiction to dispense with the strict letter of the general orders, in the cases mentioned in the act, as the Court itself has.

In this suit, application for leave to amend had been made to the Master, under the 3 & 4 Will. 4. c. 94. s. 13; but as the time within which the plaintiff was at liberty to amend, under the 13th order of 1831, had expired, the Master considered he had no power to exercise any discretion in such a case, and refused the application.

Mr. Elmsley, on behalf of the plaintiff, now moved before the Vice Chancellor for leave to amend.

Mr. Torriano appeared for one of the defendants.

The VICE CHANCELLOR said, he had mentioned the point to the Lord Chancellor, and had his authority for deciding, that where an application was made to the Masters, in the cases which were pointed out by the statute (1), the Masters had the same jurisdiction to dispense with the strict letter of what were called the common orders of the Court, as the Court itself has; and he hoped he should not have to hear any

(1) 3 & 4 Will. 4. c. 94. s. 13; and see 20th New Order, 1833.

more appeals from the Masters, on the supposition that they were not at liberty to exercise their own discretion in these matters.

M.R.
Nov. 10, 11, 1837. } JONES V. WISE.
Jan. 13, 1838. }

Forfeiture—Insolvency.

Property was settled on A. until he should (amongst other things) attempt or agree to sell, alien, charge, or incur it. A. afterwards endeavoured to raise money by means of the property, but was prevented from effecting his object by the terms of the settlement:—Held, that no forfeiture had been committed.

By the settlement made on the marriage of the defendant, R. T. Scarborough, with Louisa his wife, the property of his then intended wife consisting of the reversion expectant on the decease of her mother, Elizabeth Harper, in a moiety of an estate at Wolvey, in Warwick, and of divers mortgage debts, &c., was vested in trustees upon the following trusts: "In trust, after the marriage, to pay the rents and profits to the wife for life, independent of her husband; and after her decease, upon trust, to pay the clear rents and profits of the said last-mentioned premises unto the said R. T. Scarborough, until he should become bankrupt or insolvent, or a commission of bankrupt should issue against him, or he should take the benefit of any act or acts for the relief of insolvent debtors, or he should sell, alien, charge, or incur the said rents and profits, or any part thereof, by way of anticipation, or attempt or agree so to do, or should die, whichever of the said events should first happen;" and there was a trust declared (in the events which happened) for the plaintiff.

There were corresponding trusts of the personalty, those in favour of Scarborough being as follows: "Upon trust, to pay said last-mentioned interest, dividends, and annual proceeds unto the said R. T. Scarborough, until he should become bankrupt or insolvent, or a commission of bankrupt should issue against him, or he should take the benefit of any act or acts

of parliament for the relief of insolvent debtors, or he should sell, assign, alien, charge, or incumber the said intended dividends and proceeds, or any part thereof, by way of anticipation, or attempt or agree so to do, or should die, whichever of the said events should first happen; and from and after the happening of any one of the said events ;"—there was (in the events which happened,) a similar gift over to the plaintiff.

Elizabeth Harper died in March 1832; and the wife of Scarborough died in December 1826, without issue.

The plaintiff, by this bill, prayed, amongst other things, that it might be declared, that by reason of the defendant Scarborough having become insolvent, as also his having attempted to sell his interest in the trust property aforesaid, under the trusts of the settlement, the trusts thereby declared in his favour ceased and determined in the lifetime of Elizabeth Harper.

The evidence, as to the attempt to sell, &c., was as follows: Mr. Brown deposed, "That sometime, to the best of his recollection, in the year 1831, Scarborough, who was confined in the Fleet, was extremely desirous of raising money either by mortgaging or selling his reversionary life interest in the moiety of the lands and premises comprised in the deed of settlement of the 6th of September 1824, in order to obtain his release from prison, and settle various other claims upon him, and he authorized the witness to mortgage or sell for him that piece of property. The witness accordingly offered the said reversionary interest to two or three persons in London, as a security for any sum that they might be disposed to advance upon it; and upon their declining the security, witness went down to Northampton, and proposed to Mr. Chase, the solicitor, to a client of whom Scarborough was already indebted, that if he would procure the advance of a further sum to the said last-named defendant, the reversionary interest should be assigned to secure the old debt, as well as the fresh advance. Mr. Chase so far entertained the proposition, that he looked at the abstract of Scarborough's title to the reversion, which witness had taken with him, but on finding some clause in one of the deeds which precluded Scar-

borough from disposing of his reversion under pain of forfeiture, Mr. Chase declined to proceed with the negotiation. It was then suggested, and to the best of witness's recollection, by Scarborough himself, that the reversion had better be offered for sale to Mr. Jones (alluding to the plaintiff William Jones), as he was interested in the property; and accordingly Scarborough and witness went together to John Harper Jones, and offered the reversionary interest to his father William Jones, for sale, for the sum of 900*l.*; and R. T. Scarborough was very urgent upon J. H. Jones that his father should buy the reversion, and represented what a convenient arrangement it would be for all parties if W. Jones would purchase it, and he begged J. H. Jones to write by the same day's post to his father, who resided at Lutterworth, in Leicestershire, to propose to him to become the purchaser of the reversion for 900*l.*; that, subsequently to this interview, Scarborough informed witness that he called upon J. H. Jones, two or three times by himself to press the purchase of the reversion by W. Jones; and witness knew that Mr. John Scarborough went down to Lutterworth, by the desire of the defendant, R. T. Scarborough, to negotiate personally with Wm. Jones for the sale to him of the reversionary interest. Witness was in communication as well with the said defendant, R. T. Scarborough, as with the said John Scarborough, respecting this journey, and paid part of the expenses of it. Witness's conversations with the defendant Scarborough, respecting the sale and mortgage of the reversion, were principally to the effect that Scarborough was extremely desirous of raising some money upon that piece of property, in order to make an arrangement with his creditors, and get released from confinement, and witness communicated with him from time to time the result of the various efforts which witness made to mortgage and sell the reversion for him." Mr. Umbers, another witness, deposed, that Scarborough, being in the Fleet prison, discussed with the witness "a variety of schemes for raising money for his relief, one of which was to charge or dispose of his reversionary interest under his marriage settlement; that this scheme

proved abortive, principally on account of the peculiar provisions of the said settlement, by which the said reversionary interest was made subject to forfeiture, if any attempt were made to charge or dispose of it." This witness also deposed, "That he knew Scarborough endeavoured to dispose of his said reversionary interest under his marriage settlement; for, in the interviews which the witness had with him in 1831, soon after his introduction to him, he consulted with witness as to the feasibility of his raising money for securing his release from prison, either by sale or mortgage of his said reversionary interest; and he furnished witness with a copy of the marriage settlement, and authorized him to raise money upon the said reversionary interest in any way that witness could best devise; and he stated that he would take 1,500*l.* for his said interest, saying, that he considered it worth more than that sum, but that he would accept that sum in order to obtain his release from prison. In pursuance of these instructions from the said defendant R. T. Scarborough, and as his agent, and with his full concurrence, witness offered to Mr. Yates, that his debt should be secured in any manner that he might think best upon the said reversionary interest, provided he, Mr. Yates, would thereupon consent to Scarborough being released from gaol; and witness sent to him the said copy of the said marriage settlement; after keeping it however some time, he declined to take any security under it, stating, that Scarborough had no power to sell or dispose of or charge in any manner his said reversionary interest; witness subsequently suggested to Scarborough, that he should endeavour to get Mr. Jones (meaning the plaintiff, Wm. Jones) to purchase the reversionary interest, as in the event of the death of Scarborough, or his forfeiting the said interest, it was to devolve upon the plaintiff, W. Jones, and his family, and was therefore of more value to him than to other persons; and witness understood from Scarborough, that some negotiation had already been entered into on his behalf by the said John Scarborough with the plaintiff William Jones; that throughout the steps that witness took to mortgage and sell the reversionary interest, witness acted

as the agent, and with the concurrence of the defendant, R. T. Scarborough."

The defendant admitted he had been arrested for debt, and in prison, but he denied that he was ever insolvent or compounded with his creditors, or that he attempted to sell his life interest.

Mr. Spence and *Mr. Geldart*, for the plaintiffs, contended, that the defendant had forfeited his life interest, first, by his insolvency; and secondly, by his attempt to sell, alienate, charge, and incumber his interest. They cited *De Tastet v. Tavernier* (1).

Mr. Pemberton and *Mr. Blunt*, for the trustees.

Mr. Tinney, *Mr. J. Cooke*, and *Mr. W. H. Smith*, for the defendant Scarborough, contended, first, that no act, which took place previous to his coming into possession, was sufficient to produce a forfeiture; secondly, that no insolvency had been proved within the meaning of the settlement; and thirdly, that a mere ineffectual attempt was not sufficient, as in *Sir Anthony Mildmay's case* (2), where the proviso was, that when A. M. should advisedly attempt, &c. or go about, &c., or enter into communication to alien, &c., his estate should cease, it was resolved that these words were uncertain and void in law, "and therefore the rule of law decides this point, *non efficit conatus nisi sequitur effectus*; and the law rejects conations, goings about, as things uncertain, which cannot be put in issue."

Abraham v. George, 11 Price, 423.

Teale v. Younge, 1 M'Clel. & You. 497.

Cutten v. Sanger, 2 You. & Jer. 459.

Parker v. Gossage, 2 Cr. M. & R. 617.

Ware v. Cann, 10 B. & C. 433; s. c. 8 Law J. Rep. K.B. 164.

Stephens v. James, 4 Sim. 499.

Shears v. Rogers, 3 B. & Ad. 363; s. c. 10 Law J. Rep. K.B. 89.

Pearse v. Win, 1 Vent. 321—

were cited; and see—

Lewis v. Lewis, 3 Law J. Rep. (N.S.)

Chanc. 55; s. c. 4 *ibid.* 77.

The MASTER OF THE ROLLS, after stating the circumstances of the case, said—

(1) 1 Keen, 161.

(2) 3 Rep. 43.

The plaintiff produced several letters, and it does appear that the defendant Scarborough did endeavour to raise money by means of the property in question, and he was only prevented from effecting his object by the terms of the settlement; he did not execute any deed or agreement, because the persons refused to go that length. It was argued, on behalf of the plaintiff, that this amounted to an attempt to sell, alien, charge, or incumber his interest. I cannot concur in this argument, for a man may desire to sell, and may inquire and take advice, and do acts which indicate his wishes, without incurring a forfeiture; and without saying that it would be necessary to execute some deed or writing in order to incur a forfeiture, I think that the acts done do not amount to such a forfeiture; and therefore the plaintiff fails in this part of the argument. As to the insolvency, it is not conclusively proved; the letters are not charged in the bill, and therefore the defendant has not had an opportunity of meeting them.

His Lordship referred it to the Master to inquire and state, whether the defendant ever, and when, became insolvent, with liberty to state special circumstances.

M. R. }
 Nov. 1837. } COLLINS v. WILSON.
 Jan. 15, 1838. }

Will—Construction—Residue.

A codicil primâ facie confirms so much of the will as it does not revoke, and the will and codicil being taken together, effect is to be given to both as far as the intention of the testator can be ascertained.

A testator, by the fourth codicil to his will, expressly ratified and confirmed some of the previous gifts, he also revoked others, and made new dispositions of parts of his property, and "all the rest, residue, and remainder of his real and personal estate and effects," he gave to five of his children equally:—Held, upon the true construction of the whole, that this residuary clause operated only upon so much of the testator's real and personal estate, as was not specifically disposed of by the will and all the codicils.

Construction of a residuary clause in the fourth codicil to a will.

The facts of this case are very fully detailed in his Lordship's judgment.

Mr. Pemberton and Mr. J. Martin, for the plaintiff.

Mr. Tinney, Mr. Goodeve, Mr. Treslove, and Mr. Kindersley, for the defendants.

Willet v. Sandford, 1 Ves. sen. 178.

Fuller v. Hooper, 2 Ves. sen. 242.

Doe v. Evans, 1 Cr. & Mee. 42; s. c.

2 Law J. Rep. (N.S.) Exch. 39.

Duffield v. Elmes, 3 B. & C. 705.

Douglas v. Leake, 5 Law J. Rep. (N.S.) Chanc. 25.

1 *Jarman's Powell on Devises*, 521—were cited.

THE MASTER OF THE ROLLS.—The question in this case arises upon the construction of a testamentary paper of Mr. James Collins, dated the 9th of December 1831, and called a fourth codicil to his will, dated the 29th of July 1826. It is alleged by the plaintiffs and some of the defendants, that this paper passed the whole of the testator's property, except such parts thereof as by the same paper he has shewn an intention to dispose of according to former testamentary papers. The other defendants contend that the paper in question may well stand in connexion with the other papers, and that in effect it only disposes of that which had not been specifically or particularly given by that and the other papers.

The testator having seven children, James, Henry, Mary Anne, Louisa, Eliza, Amelia, and Charles Frederick, and being entitled to a large property, freehold, copyhold, and leasehold estates, money in the funds, Bank and East India stocks, shares in the stocks of different companies, and other personal estate, by a will, dated the 27th of July 1826, gave several legacies to friends, servants, and clerks, and to various charities; and he made gifts in favour of all his grandchildren. To his eldest son James, he gave 1,000*l.*, having, as he says, given him, and laid out for him a very large sum of money; he made provision for Henry, and gave to trustees for the benefit of each daughter, 10,000*l.*, 3*l.* per cent. annuities, besides other property particularly described; and the residue was given to the four daughters and the younger son Charles. The will appears to have

been formally and carefully made; it constitutes trustees and executors, and contains the usual clauses for changing and indemnifying the trustees.

It seems that the testator made a former will with codicils thereto annexed, and three of such codicils have been admitted to probate. The first is dated the 30th of August 1823, and purports to give certain legacies and benefits to Mr. Rippingham. The second is dated the 1st of November 1825, and gives the testator's law books and his premises in Spital Square, to his son Charles, for his own use and benefit. The third is dated the 1st of March 1826, and revokes the bequests to Mr. Rippingham; and there is a superscription signed by the testator, in which, after noticing his will dated the 27th of July 1826, he says, "Upon reviewing this codicil, I find it contains a bequest of the Spital Square premises to my son Charles, and a legacy of my law books, and must therefore be taken as part of my will."

Considering the paper which is called the will, and these codicils of prior date, thus referred to as constituting the will, it appears that the testator made alterations from time to time; and there are some marginal notes with dates, and many erasures. Opposite the legacies given to servants named Chatfield and Ford, he has written, "May 18, 1828, I revoke this legacy to Henry Chatfield, and also to Joseph Ford; and I give Chatfield's legacy to Richard Cole, in addition to his own." And opposite to the proviso for the contingency of Charles dying under twenty-one years of age, he has written, "He has attained twenty-one, January 5, 1830." And opposite the gift of the shares to each of his six children, including James and Henry, the names of James and Henry being struck out with a pen, he has written on the margin, "These I have already assigned to James and Charles, March 1830." And there are many obliterations and notes of revocation without date.

The paper which is called the first codicil, is dated the 22nd of November 1830, and he declares that it is to be taken as a codicil to his last will and testament, dated the 29th of July 1826; he then revokes all the legacies which he had erased with a pen in his will, but, as he says, to avoid

mistake or doubts about such erasures, he thought it proper to repeat, and for the most part to specify them. And then he formally revokes many of them, and all the legacies given to Henry; after that, he revokes the legacies given by the codicils of prior date, to Rippingham, and ratifies the gift of the premises in Spital Square to Charles. He then revokes the legacies given to Amelia, except the 10,000*l.* consols, she having married since he made the will, on which occasion, he had made a provision for her, but confirmed the legacies of 10,000*l.* consols, and also the share of residue given to her. And after giving other legacies, he ratified the bequest of law books to Charles, and gave his other books, and the use of his carriages and other things, to his single daughters, and then revokes all former wills and codicils, except so far as he had thereby confirmed them.

By the second codicil, dated the 29th of June 1831, he revoked the appointment of executors, and appointed his son-in-law Josiah Wilson and his son Charles executors.

By the third codicil, dated the 22nd of November 1831, he revoked the devises of the freehold estates, by his will made to the use of his four daughters and his son Charles, and then devised the freehold estates, particularly describing them; and also all other his real estates, wheresoever situated, to Josiah Wilson and Samuel Wilson, and their heirs, in trust as to one equal undivided fifth part thereof, to each one of his five children Mary Anne, Louisa, Eliza, Amelia, and Charles, with limitations to their children.

The fourth codicil, dated the 9th of December 1831, on which the question arises, begins thus, "This is a codicil to the last will and testament of me, James Collins;" he then recites that he had by his will given and devised his piece of copyhold land at Stamford Hill unto or to the use or benefit of his daughter Mary Anne, her heirs or assigns for ever. What he had done, was to give, amongst other property, all that copyhold messuage, tenement, land, and premises opposite his house at Stamford Hill, and also all that five acres copyhold field in Hanger's Lane, which he had surrendered to the use of his will, to trustees, for the separate use of

Mary Anne for her life, with remainder to her children as she should appoint. But having recited, as I have mentioned, he by his fourth codicil revokes the devise, and gives the piece of copyhold land at Stamford Hill to Mary Anne, for her life only, with remainder to his other daughters and his son Charles for ever. He then recites that by his will and codicil he had given divers pecuniary legacies to his son James. In fact, he had by the will, but not by any codicil, given to James 1,000*l.*, and certain canal and other shares. By the fourth codicil, he revokes all the bequests to James, and gives him an annuity of 156*l.* He then gives to Louisa 1,000*l.* Bank stock and the reversion of 1,000*l.* East India stock; Eliza 1,000*l.* Bank stock and the reversion of 1,000*l.* East India stock; to Eliza, leasehold messuages in Grenville Street, at Kennington, and St. Paul's Church Yard, and at Wellstead. All those leaseholds with other property were by the will given to trustees for the use of Eliza, for a limited interest, with remainder to her children. To Amelia, his leasehold at Phoenix Wharf, on trust to pay the expenses of insuring and repairing, and subject thereto, "upon the same trusts for her and her children, as by the will were expressed, concerning the legacy of 10,000*l.* consols, therein bequeathed for her use, which bequest I hereby ratify and confirm." To Charles 1,000*l.* East India stock bonds, and 10,000*l.* to be payable and produced from the testator's annuities and mortgages; and he also gave to him those leasehold properties, some of which had been by the will given to him, and others had been by the will given to Amelia and Louisa. He then gave a legacy of nineteen guineas to a servant, and then proceeds: "As to all the rest, residue, and remainder of my real and personal estate and effects, whatsoever and where-soever, I give and bequeath the same and every part thereof, unto and between my said daughters, Mary Ann Collins, Louisa Collins, Eliza Collins, and Amelia Wilson, and my said son Charles Frederick Collins, their heirs, executors, and administrators, according to the nature and quality thereof, to be equally divided between them, share and share alike. In witness whereof, I, the said James Collins, have to this codicil to my last will and testament," &c.

The question is, whether by the words "all the rest, residue, and remainder of my real and personal estate," which the testator has used in this codicil, he meant all that he had not specifically or particularly disposed of by his codicil either in direct words or by distinct confirmation of former testamentary dispositions, or all that he had not specifically and particularly disposed of by this codicil and former testamentary papers taken together.

On the one hand, it is alleged, that the fourth codicil is, as to the beneficial gifts, a substitution for the will and previous codicils, revoking all the dispositions therein, which are not expressly confirmed; on the other hand, it is alleged, that the fourth codicil only varies the effect of the will and previous codicils, first, by revoking particular dispositions; secondly, by making new bequests; and thirdly, by substituting a new residuary devise and bequest in the place of the residuary bequest in the will, and the residuary devise of the third codicil. If the testator meant any prior dispositions to stand without confirmation, why, it is asked, has he thought it necessary to confirm the gift of 10,000*l.* consols for the benefit of Amelia and her children? Why has he, by the codicil, given to Eliza certain leasehold estates which he had before given to her by the will, but in a different manner, and yet without noticing the will in reference to that bequest? And why has he, by the codicil, given to Charles certain India stock and leasehold estates, without noticing that he had given to him the same property by his will and first codicil?

It is argued, that if he had thought or intended that the legacies given by the former paper should stand without confirmation, he would not have thought it necessary to confirm them; but, on the other hand, it is contended, that the testator could not have intended the fourth codicil to operate as a general revocation of the prior dispositions, because he has, in fact, thought it necessary to notice some cases in which an alteration or revocation was intended. The gift of the copyholds to Mary Anne is treated as an alteration of the gift made by the will; and the legacies given to James are expressly revoked, which would not have been done if the testator had not un-

derstood and meant that the legacies given by the former instruments would stand without express confirmation if they were not revoked; and with respect to the confirmation of the legacy of 10,000*l.* consols given to Amelia by the will, it is observed, that between the date of the will and the first codicil Amelia had married, and on her marriage the testator made a provision for her; and by the first codicil he revokes the bequest made to her in the will, except the 10,000*l.* consols, and her share of the residue. And when by the fourth codicil he made a distinct gift to her of his leasehold estate, called Phoenix Wharf, he might reasonably think it important to guard against any doubt of this being intended to be a substitution for the 10,000*l.*, and consequently, that confirming this particular legacy affords no reason for concluding that other legacies, not confirmed, were not to stand, and that the clause relating to Amelia expresses only that she was to have Phoenix Wharf in addition to the 10,000*l.* consols given by the will. And as to the repetition of the gifts to Charles, the gifts repeated are intermixed with new gifts, and were probably intended to shew that the new gifts were intended to be in addition to the old; and it being admitted that there are difficulties in any view of the case, it is urged, that assistance may be obtained from the meaning of the word "codicil," which ought to be considered as an appendix or supplement to a will, not as a substitution for it. In this case, the testator can hardly be considered as having used the word "codicil" in the strictest sense. In the superscription (as it is called) of even date with the will, he has given some effect to a paper of prior date, which is called a codicil by the first codicil, properly so called. He revokes legacies given by the three codicils of date prior to the will, and confirms a legacy given by one of them. Nevertheless, we can hardly suppose that the testator should, in the beginning, and also at the end of the paper, call it a codicil to his will, without intending that it should in some way, and to some purpose, be taken in connexion with the will; and accordingly it is admitted, that to some extent the will must stand; and it is argued, that it may stand as to the appointment of executors, though

varied by the second codicil, as to the powers given to them as trustees, and the provisions for indemnifying them and appointing new ones; and this without giving effect to any beneficial legacy, not confirmed by the last codicil.

As a general rule, a codicil *prima facie* confirms so much of the will as it does not revoke; and the will and the codicil being taken together, effect is to be given to both, so far as the intention of the testator can be ascertained. Where there are several instruments, all must be made consistent and effectual as far as they can be, and where there is a general residuary clause, it must be applied to so much of the property as by a sound construction of all the instruments taken together, is not specifically or particularly disposed of.

There is, no doubt, great difficulty in particular cases, and in this as much as in any I have met with; but after reading these instruments many times over, I do not think that the testator intended, or that the effect of the words he has used, is, that the fourth codicil should operate as a substitution for all the beneficial interests given by the former instruments, and not confirmed by the same codicil.

I think that upon the true construction of the whole, the residuary clause in the fourth codicil operates only upon so much of the testator's real and personal estate as was not specifically or particularly disposed of by the will and all the codicils. I must declare, that upon the true construction of the fourth codicil, the residuary bequest of the personal estate, which is contained in the will, and the residuary devise of the real estate contained in the third codicil, and not the specific or particular devises or bequests in the will and codicils, are revoked.

M.R. }
Mar. 1, 2. } MOORE v. FROWD.

Practice.—Judgment.

The several parties to a cause, which had been heard by the Lord Chancellor when Master of the Rolls, consented to his Lordship delivering judgment when Lord Chancellor, except one defendant, who did not appear at the hearing. The plaintiff hav-

ing proceeded to take the bill pro confesso against such defendant. — Held, that he could not object to the decree, on the ground of his not having joined in the consent.

This cause originally came on to be heard before Sir C. C. Pepys, in December 1835, and occupied several days in hearing, (see 6 *Law J. Rep.* (n.s.) *Chanc.* 372,) —at the hearing Elkington, one of the defendants, made default. The cause proceeded as against the other defendants.

On the 16th of January 1836, Sir C. C. Pepys, who had not then delivered judgment, being about to accept the Great Seal, his secretary applied to the parties, except Elkington, for their "consent to his Honour's delivering judgment in the case as Master of the Rolls, after his appointment to the office of Chancellor, and to be bound by the same, as if it had been given previously to his vacating the Mastership of the Rolls, and that the decree or order to be pronounced should bear date the 16th of January 1836;" to this the parties assented. Judgment was not pronounced until August 1837; and a question having afterwards arisen between the plaintiff and Frowd, as to when the decree ought to be dated, the Lord Chancellor, in December 1836, ordered that it should be dated on the 16th of January 1836, which was done accordingly.

Elkington now presented a petition to the Master of the Rolls, stating, that he had been served with a copy of a subpoena, to shew cause why a decree, made by the *Master of the Rolls* on the 16th of January 1836, should not be binding on him; and in default, that such decree should be made absolute against him.

The petition and affidavit in support stated, that the decree had been made by the *Lord Chancellor*, by the consent in writing of the other parties, on the 14th of August 1837; but that the petitioner was not directly or indirectly a party to such consent: and the petitioner submitted that the same was not binding on him. The petition prayed that all proceedings, to make the decree absolute against him, might be stayed.

Mr. Tinney and *Mr. Piggott*, in support of the petition.

Mr. Pemberton and *Mr. Heathfield*, contra.

March 2.—**THE MASTER OF THE ROLLS.** This is a petition by *Mr. Elkington*, one of the defendants in this cause, praying that all proceedings, to make the decree absolute against him, may be stayed.

The cause came on to be heard so long ago as December 1835, and occupied seven days in hearing. Elkington, one of the defendants, made default. I may assume, that there was an affidavit of the service of the subpoena to hear judgment produced, and that the plaintiff had leave given him, to take such decree as he could abide by against such defendant. That being the state of the case, I am of opinion that his interest was bound at that time, and that he cannot be heard except on the usual terms of paying the costs, and having the cause reheard. There were many other defendants, and the Judge suspended his opinion, and being an intricate case, it was no doubt more satisfactory to all parties that he should take time. On the 16th of January 1836, the Master of the Rolls being about to accept the office of Chancellor, his secretary applied to the parties to consent that he should deliver judgment after he had ceased to be Master of the Rolls, and it was consented to. This took place on the 16th of January, being two days after the last hearing. Judgment was, in fact, pronounced by the Lord Chancellor in August 1837, and a separate judgment was pronounced on the minutes on the 16th of December 1837. The question then was, what should be the date of the decree, it being contended, on the part of the plaintiff, that the decree ought to bear date when the judgment was pronounced, but the defendant Frowd insisted that it should bear date when the consent was given, which was the 16th of January 1836: the Lord Chancellor determined that the decree should bear date on the day when the consent was given. The decree being accordingly drawn up, service of a subpoena to shew cause was served on the 5th of February 1838. No cause was shewn, and the order was made absolute before the petition came on for hearing. That I think would have decided the question of itself; I do not think it necessary to go into the other circumstances of the case. I think that *Mr. Elkington* was bound on the day when the cause was

heard, and when the plaintiff was entitled to take such decree as he could abide by; and I think that nothing which has taken place in the cause, with relation to the other parties, would alter his position in that respect.

I am of opinion, that there is no ground for this application, and the petition must therefore be dismissed, with costs.

M.R. }
Feb. 24. } ROBERTS V. LLOYD.

Practice.—Pauper.

The plaintiff being a pauper, the Court, instead of ordering the papers relating to the matters of the suit, which were in the defendant's custody, to be deposited with the clerk in court, directed an inspection, at the office of the defendant's solicitor.

Mr. Monro moved, that the defendant should leave with his clerk in court, for the usual purposes, the papers, &c. admitted to be in his possession, relating to the matters of the suit. There was nothing special in the circumstances of the case; the plaintiff was, however, a pauper.

Mr. Stewart resisted depositing the papers with the clerk in court, and proposed, in order to save expense, that they should be inspected at the office of the defendant's solicitor.

The MASTER OF THE ROLLS said—that under the circumstances, he would not put the defendant to any expense, so that justice was done to the plaintiff, and every proper facility for an inspection being given to him. The production must be therefore made at the office of the defendant's solicitor.

L. C. }
Feb. 21, 28. } BERNAL V. BERNAL.

Will—Construction—Male Children—Descent.

A testator having made a provision for the necessitous "male children" of his nephews, and having shewn his intention of making it a perpetual charity:—Held, that "male children" meant "male descendants."

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Held also, that under these expressions that male descendants, through the male line, were alone entitled, and that those males who claimed through a female were excluded.

The report of this case at a former hearing, will be found in the 4 *Law J. Rep.* (N.S.) *Chanc.* 274.

The will of the testator Gaspar Francis Bernal, made at Amsterdam, and dated in 1693, contained the following clauses:—

"I order, that the effects which I have in the India and African Company of London, and their profits, shall be applied to the performance of this my will, and what shall remain, be it little or much, it shall be put into stock in the chamber of Zealand, whose dividends, and those of London, with the interest of 1,200*l.* in that of the African at London, shall be applied to keep the capital entire, except that it should happen to appear to my executors that any of the relations hereinafter named, should be reduced to want, in which case all the dividends or interests shall be applied to those in necessity, which are Jacob Levi Gomez, Abraham and Jacob de Isaac Bernal, Isaac de Jacob Bernal, Benjamin Bernal, and also Rachel Lonzada, Leah de Castro, and Esther Franco, if they or their children shall come to want; and in like manner the male children of the above-named men; also included in this clause, Leah, Rachel, and Esther, daughters of Jacob Bernal, my brother, and their children, whom God prosper they may not come to want this; and it is also my will, that when it shall happen that any female orphan of my generation, being Jews, are to be married, there shall be given to them 1,000 guilders dowry out of the said interest, by the votes of the executors of my will, and the grandsons and great-grandsons of the race of my father, who is in glory, that shall be found living in Judaism, which my executors shall perform, and when any die, shall name others in their place.

"Item, I name for my executors of my testament and this my will, Jacob Levi Gomez and Abraham Bernal, my nephews, with power at the end of their days to name others in their place, to execute and administer of what shall be left of my estate and effects in the manner that shall appear to them to be most for the security

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and benefit; for that my meaning is, that as much stock as may be, shall be preserved, that their produce may answer and be applied to the necessities of those of the race of my father, (whom God hath,) at the discretion of my executors, and those they shall name in their places: and I charge the one and the other, to choose out of our heirs and near kindred persons capable to the end, that in this manner the memory hereof may be preserved for the comfort and succour of our family, and that they may be provided for. I hope other relations will augment this stock, to the end they may have greater assistance in the adversity that may befall them, (from which God deliver us,) the descendants or near kindred, who for sins may suffer these or the like misfortunes, (from which God deliver them,) that they may succour the others; I say my will is, that Isaac de Jacob Bernal and Benjamin Bernal, my nephews, be also my executors, that they may receive of my goods and effects, be it only by Jacob Levi Gomez, or who else shall have a power from him and the rest, for that they may help him in fulfilling my will, and have voices in the things, and successors that are to be given more than what is herein expressed in this my last will; and likewise my will is, that in these causes, Leah de Castro and Esther Franco, my nieces, shall meet and have votes, by reason they have more knowledge of our relations in Spain, and of my inclinations and obligations; and I charge everybody that they give to the children of Benjamin Bernal, and prefer them to others, if they should want, or be to be married."

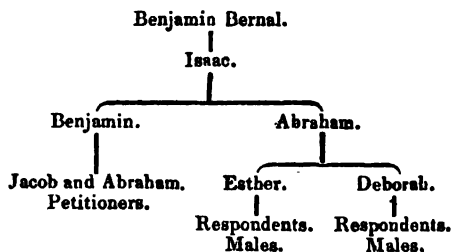
A suit being instituted in 1728, different persons were admitted partakers of the interest of the fund, as stated in our former report.

On the reference in our report stated to have been made, it was found that the testator's domicile was at Amsterdam, and that the law regulating the testamentary disposition of Jews there, was the same as that regarding Christians.

By an order of the Lord Chancellor, of the 15th of August 1837, founded principally on an opinion given by Mr. Delprat, a Dutch advocate, it was declared that the *male descendants* of Jacob Levi Gomez,

Abraham Bernal, Jacob Bernal, Isaac Bernal, and Benjamin Bernal respectively, the testator's five nephews named in his will, and also the *male and female descendants* of Rachel Lonzada, Leah de Castro, and Esther Franco respectively, the testator's three nieces, also named in his will, or such of them as were or might be reduced to want or necessity, and professing Judaism, were entitled to participate in the dividends or interest of the fund in court, but subject to the male descendants of the said Benjamin Bernal, the testator's favoured nephew, or such of them as were or might be in want or necessitous circumstances, being preferred therein to others. And it was referred back to the said Master, to inquire and state to the Court, who were the persons entitled, according to such declaration.

All the descendants of the five nephews of the testator, except Benjamin, and all the male and female descendants of the testator's three nieces, were supposed to be extinct, no claim having been made on their behalf. It appeared before the Master, that the pedigree of the claimants was as follows:—



The petitioners, Jacob and Abraham Bernal, as will be seen from the above pedigree, were the male descendants of Benjamin Bernal, through the male line, and the respondents were male descendants of Benjamin Bernal, *through a female*. The Master by his report submitted, whether the last-named claimants were entitled to participate in the fund.

The petitioners sought to have a declaration, that they were the only male descendants of the testator's favoured nephew Benjamin Bernal, who were entitled to participate in the income of the fund consisting of 7,300*l.* old South Sea annuities.

Mr. Wakefield and Mr. Cooper contend-

ed, that the petitioners alone were entitled, they being the only persons who were descended from Benjamin Bernal through males. That a party could not claim, who traced his pedigree through a female, in the same way as the heir in tail male must claim exclusively through males. In *Oddie v. Woodford* (1), Lord Eldon, and afterwards the House of Lords, held, that a male claiming through a female, was not entitled under a limitation to the "eldest male lineal descendants."

Sir William Horne and Mr. Sidebottom, contrâ.—The words "male children" have already been decided to mean "male descendants," and it is therefore only necessary to make out that the defendants are "males" and "descendants," which is admitted. The respondents cannot be disqualified, merely because they claim through a female. The case cited was determined on the strict technical rules applicable only to English property, and ought not to govern the present case; besides which, the expression "lineal" was principally relied on in *Oddie v. Woodford*. They cited—

5 Ann. c. 3.

Bulter v. Stratton, 3 Bro. C.C. 367.

Pierson v. Garnet, 2 Bro. C.C. 38.

Crosley v. Clare, 3 Swanst. 320, n.

The LORD CHANCELLOR (after stating the circumstances of the case,) said, that, after consideration, he was satisfied that the question was to be determined without reference to the law of Holland. That it had not been suggested that there were any technical rules in Holland applicable to the construction of this will, the question being, whether the testator intended the qualification should be males through males exclusively, or should include males descended through females. Both sets of claimants, he said, were descended from Benjamin Bernal, the one through males and the other through a female. The order of the 15th of August 1837, decided that the male descendants of Benjamin Bernal were entitled; and the expressions and the general scheme of the will, proving that the object of the testator was to establish a permanent charity, it was necessary, in order to give effect to that intention, that

this word "children" should be read descendants. The law of Holland permitting this species of provision for families, it was to be considered who were to take, the qualification being, that they should be male descendants; and to entitle a party to claim, he must shew that he was one of the class. A male claiming through a female, would certainly answer the description of male descendants, but would not be construed to be issue male.

The case of *Oddie v. Woodford*, said his Lordship, was a strong case. There, though a party was lineally descended, yet claiming through a female, he was held by the House of Lords to be incapable of presenting to a living under the description of "the eldest male lineal descendant" of a son of the testator. The statute relating to the Duke of Marlborough does not assist in the construction of this will. It appeared here that the testator intended to designate the male line as the class; and that such was his intention, appeared from the provision he afterwards made for the females. If, instead of providing for the male line, he had intended to include females, why make a separate provision for them? It would be more natural to provide for the whole together. My opinion is not formed on any speculation on what might have been the testator's intention beyond what he had expressed on the face of his will, and on that I think that the petitioners are solely entitled.

L.C.
Nov. 1821. }
H. LORDS. } ODDIE v. WOODFORD.
June 1825. }

Will—Construction.

The term "eldest male lineal descendant," held upon the construction of the will of Mr. Thellusson, not to include a male descendant claiming through a female.

The testator, Peter Thellusson, by his will, dated in 1796, directed his trustees to accumulate his property during the lives of his three sons, and the lives of their issue, living at the testator's death, and lay the same out in the purchase of real estates,

(1) See the next case.

and, after the period of accumulation, to divide the estates into three equal parts, and convey one of such allotments as follows: "to the use of the eldest male lineal descendant then living, and who shall be entitled to the first choice of such allotments, of my said son Peter Isaac Thellusson, in tail male; with remainder to the second, third, fourth, and all and every other male lineal descendant or descendants, then living, who shall be incapable of taking as heir in tail male of any of the persons to whom a prior estate is hereby directed to be limited, of my said son Peter Isaac Thellusson successively in tail male." He made similar limitations of the other two-thirds to his other two sons respectively, with cross remainders between them; and he ordered and directed his trustees, when any advowson was vacant, "to present a fit and proper person thereto, who should for that purpose be nominated by one of his said sons in rotation, the eldest having the first nomination, and the like nomination to be made by the *eldest male lineal descendant* of his said three sons respectively, in the order and rotation aforesaid, if he be capable by law of making such nomination, when the church became vacant, or in due time afterwards, otherwise the eldest male lineal descendant of the next brother was to present to such living. And in case it should so happen, that when such living or livings should respectively become void, or in due time afterwards, no male lineal descendant of any of his said sons should be capable of presenting thereto, he directed his said trustees, or the survivors or survivor of them, or such future trustees or trustee for the time being, to present to such living or livings respectively."

One of the testator's sons, George, died without male issue, but leaving daughters.

This bill was filed on behalf of an infant who was the eldest son of one of such daughters, and who was consequently the great-grandson of the testator Peter Thellusson, through a female, claiming the right to nominate according to the rotation prescribed by the will, to a vacancy in a living, part of the trust property.

LORD ELDON, in a very long and able judgment, dismissed the bill, on the ground,

that upon the true construction of the will, a party claiming through a female was not entitled to such right of presentation.

An appeal was presented to the House of Lords, when, on hearing of the appeal and a cross appeal of the heir-at-law, two questions were referred to the Judges, which were in substance, first, whether on the supposition that the dispositions of the will had been legal instead of equitable, a great grandson claiming through males exclusively, would be entitled to nominate in preference to a great-grandson claiming through a female, both being adult; and secondly, whether on the supposition that both great-grandsons claimed through males, an adult claiming through a younger son would be entitled to present in preference to an infant claiming through an elder son. The Judges certified on the first question in the affirmative, and on the second in the negative.

Whereupon, the House of Lords declared, "that the plaintiff was not entitled to any relief by his bill," and the cause being afterwards set down for further directions in Chancery, was dismissed. See *Seton's Decrees*, 391.

M. R. }
Mar. 16, 17. } ROGERS v. SOUTTEN.

Legacy—Admission of Assets—Loco Parentis—Interest on Legacy.

Generally where an executor denies assets, an order for payment of a legacy is not made until the accounts have been taken; but the accounts are not directed if the answer discloses other circumstances which shew a personal liability.

A father held, under the circumstances, to have placed himself in loco parentis towards the illegitimate children of his deceased son, and interest given to such children on legacies, from the decease of the testator.

William Buckland, the testator, by his will, dated the 1st of March 1821, "gave and bequeathed the sum of 50*l.* each unto the two illegitimate children, of which his deceased son was the putative father;" and he gave the residue and remainder of his property to the defendant Edward Soutten,

and appointed him his executor. By a codicil to his will, dated the 11th of August 1821, the testator "gave unto each of the two putative children of his deceased son the sum of 50*l.*, in addition to a like sum given to them by his said will, and to be paid to them on their attaining the age of twenty-one years." The testator died in 1824, and the defendant afterwards proved his will. The plaintiff, Susannah Rogers, who was one of the illegitimate children of the testator's son, referred to in his will and codicil, attained her age of twenty-one years in March 1831. The defendant not having paid the plaintiff her two legacies of 50*l.* and 50*l.*, she filed this bill for the purpose of obtaining payment. There were two questions argued at the bar: first, whether, under the circumstances stated in the judgment of his Lordship, an order for payment of the legacies should be now made against the defendant, without having the accounts of the testator's estate first taken, the executor having denied assets; and, secondly, from what time interest was payable on the legacies.

Mr. Pemberton and *Mr. H. W. Busk*, for the plaintiff, asked for an order for immediate payment, with interest from the death of the testator.

Mr. Cooper and *Mr. Hill*, contra, resisted an order for payment until the accounts had been taken; contending, that it was contrary to the practice of the Court to make such an order, unless there was a clear admission of assets; and, secondly, they argued, that interest was payable on the first legacy only from one year after the testator's death; and, on the second, from the time of the legatee's attaining twenty-one — *Wetherby v. Dixon* (1), and *Ellis v. Ellis* (2), were cited on the second point.

THE MASTER OF THE ROLLS.—This is a bill filed for the payment of two legacies of 50*l.* each, given by the will and codicil of William Buckland, dated respectively the 1st of March 1821, and the 11th of August 1821. Now, the 50*l.* by the codicil is given in addition to the 50*l.* bequeathed by the will, and is payable to the legatee on her attaining twenty-one. There were

two questions raised in this case, first, whether the defendant is at this time liable to an order for payment of the legacies, he having by his answer in terms denied assets. It is true, that ordinarily where a defendant denies assets, the accounts are first directed to be taken; but it does not follow that accounts are in such cases directed to be taken, if, with the denial of assets, the answer discloses circumstances which shew a personal liability for what is asked. The question is, whether such circumstances exist in the present case; the testator having given certain legacies by his will, gives to the defendant, his executor, the residue of his personal, and all his real estate. After the death of the testator, his will was disputed, and the defendant then thought right to enter into an agreement with the relations of the testator, who were disputing the will, for a compromise. It was of this nature, that they should leave the defendant in undisputed possession of, and with an unimpeachable title to the real estates, and that the defendant should give to them all 'the personal estate, which is stated to have amounted to the sum of 2,500*l.* This they received, and the defendant was left in possession, with a confirmed title to the real estates. The personal estate was subject to the payment of the funeral and testamentary expenses, debts and legacies. The defendant dealt with it as his own, for the purpose of procuring for himself an indefeasible title to the real estate; but he could not thereby deprive the plaintiff of any benefit or claim to which she was entitled against the personal estate. It was in 1826, when he used the personal estate as his own, for his own advantage, undertaking to pay the debts, and funeral and testamentary expenses, but, as it is said, not the legacies. The transaction, however, took place under circumstances which could not by possibility defeat the claims of the legatee.

After this, he being in possession of the real estate, is called on for payment of legacy duty, which he pays, even on the legacies in question, in the year 1830, and at various times pays the other legacies, and makes a compromise with another legatee, who was in the same circumstances with the present plaintiff. After the lapse of some years, he is called upon for an ac-

(1) 19 Ves. 407; s. c. Coop. 279.

(2) 1 Sch. & Lef. 5.

count, and he renders one, and he says the debts are so much, and the personal estate so much, leaving a large balance, more than sufficient to pay the plaintiff; he does not, however, pay, because, he says, he has no assets, and for this reason, because he has given them to other persons, for the purpose of securing the real estates; and he has truly denied by his answer that he has assets, because he has given them to other persons, for the purposes I have stated. The question is, if this is such a denial of assets as to entitle him to have an account taken of the testator's estates; and I am clear that he has precluded himself from any title to an account in this respect.

The next question is, from what time interest is payable on the legacies. If there are no peculiar circumstances, interest is payable from the expiration of one year from the death of the testator. As to the second legacy, it was to be paid in addition to a like sum which is given by the will.

It is said, that the testator stood *in loco parentis*, or has assumed an obligation for maintaining the plaintiff. I do not recollect any case in which the circumstances of the present have occurred. The son of the testator, a very young man, who died under the age of twenty-one years, became the father of the plaintiff, in consequence of which, he became bound to save the parish from any liability. Not being able to do it, the testator, his father, stepped forward, and entered into a bond to maintain the child, and pay 8s. a week, and this obligation he seems to have performed during his life, with small exceptions. There were some arrears at his death, which were paid by the defendant.

The testator thus voluntarily assumed a duty for the sake of relieving his son, the effect of which was to contribute so much for the plaintiff's maintenance, and this was performed till his death; previous to his death, he had assumed the situation of one *in loco parentis*, and with this obligation pressing on him, he makes this provision for the children. The question is, whether this is not sufficient to extend the ordinary rule for payment of interest on the legacies, from one year after his death to the testator's death.

On the whole, I think, there is sufficient to say, that interest ought to be paid from the death of the testator; therefore, let the interest be computed, and an order be made for the payment of the legacies, with interest, together with the costs of the suit.

M.R. }
March 23. } WILSON v. BROUGHTON.

Pleading—Parties—Costs.

THE MASTER OF THE ROLLS, in this case held, that the representatives of a deceased trustee were necessary parties to a bill against the surviving trustees; and he ordered the cause to stand over for want of parties, with liberty to amend, but refused to the defendants the costs of the day, they not having taken the objection by their answer.

As to the first point—i. e. parties, see

Walker v. Symonds, 3 Swanst. 75.
Wilkinson v. Parry, 4 Russ. 274, n.
Munch v. Cockerell, 6 Law J. Rep. (n.s.) Chanc. 9.
Wilson v. Moore, 1 Myl. & K. 143.

As to the second—the costs :

Mitchell v. Bailey, 3 Madd. 61.
Hill v. Kirwan, Jac. 163.
Keating v. Keating, 1 Mol. 218.
Giles v. Giles, 5 Law J. Rep. (n.s.) Chanc. 46.
Court v. Jeffery, 1 Sim. & Stu. 106.
Attorney General v. Hill, 3 Myl. & C. 247.

V.C. }
Mar. 30. } ARCHIBALD v. WRIGHT.

Will—Construction—Interest or Power.

Bequest to a lady of a sum of stock, "to be transferred to her for her sole and entire use during her life, that she shall not alienate it, but enjoy the interest of it during her said life, and, at her decease, she may dispose of it as she thinks fit :"—Held, not to give an absolute interest, but a life interest, with a power of appointment by will; and the lady having died intestate, the stock was held to have fallen into the residue.

Henry Wright, by his will, dated the 12th of September 1824, after reciting that he had executed a deed of trust, settling a certain portion of his property, declared as follows:—

"I stand possessed of the remaining sums—viz. 1,000*l.* in the old 4*l.* per cents. ; 630*l.* in the late Navy fives, and 100*l.* in the 3*l.* per cent. consols, which I dispose of in the following manner—viz. I bequeath the 100*l.* in the 3*l.* per cent. consols, to Johanna Grant, of No. 7, Charlotte Street, Pimlico; I give the interest of all the rest to my dear wife Eliza, to be enjoyed by her during her life; at her decease, I give the same to my child Henrietta; I further will, that at the decease of my wife, the sum of 1,000*l.* in the old 4*l.* per cents. be transferred to Johanna Grant, *for her sole and entire use during her life, that she shall not alienate it, but enjoy the interest of it during her said life, and at her decease she may dispose of it as she thinks fit*; I further will, that after the decease of my wife, and should Henrietta also die, (without issue,) and the above named Johanna Grant be living at the time of the decease of the said Henrietta, I, in that case, will and bequeath to Johanna Grant before named, the further sum of 2,800*l.* in the 3*l.* per cent. reduced stock, which sum is referred to in the trust deed alluded to in the first part of this document; I further will and bequeath to my dear wife, my house and furniture, and everything appertaining to Ham (1), during her life; at her decease, I give the same to my child Henrietta; I also give to my wife the seven Lancaster Canal shares, during her life, and at her decease, I give the same to Henrietta. Dated at Ham, the 12th of September 1824. H. Wright. I appoint my brother sole executor of this my last will."

The testator afterwards made a codicil as follows:—"Codicil made the 19th of October 1824. In addition to the provision hereinbefore made for Johanna Grant, at the decease of my wife, I give and bequeath to her the further sum of 430*l.* in the late navy fives, for her disposal. Henry Wright."

The testator died on the 7th of April

1825, and his brother John Wright, a defendant, proved the will and codicil on the 21st of July 1825.

The 1,000*l.* 4*l.* per cent. annuities, and 630*l.* Navy 5*l.* per cents., were reduced in the testator's lifetime to 3½*l.* per cent. annuities, and by reason of a deficiency of the general personal estate for payment of debts, &c. these sums were partly applied for that purpose, and abated in proportion, leaving 800*l.* of the former, and 504*l.* of the latter, for the legatees.

On the 16th of February 1831, Johanna Grant married John Archibald, and died on the 9th of September 1832, and letters of administration of her effects were granted to her husband by attorney, he being then resident in the East Indies.

John Archibald, the husband, died in July 1834, and made a will, dated the 20th of the same month, but did not appoint an executor; and John Archibald, the plaintiff, obtained letters of administration, both of the estate of John Archibald and of Johanna his wife, deceased.

Eliza Wright, the widow of Henry Wright, the testator, died on the 6th of November 1835; and thereupon the plaintiff filed his bill against John Wright, the executor, and Henrietta Ann Wright Place, who was a natural daughter of the testator, claiming a transfer, not only of the 430*l.* bequeathed by the codicil, but also of the 800*l.* residue of the 1,000*l.* bequeathed by the will.

The cause came on to be heard on bill and answer; and owing to the parties differing on the minutes, was twice argued; first, on the 2nd of March, and again this day.

Mr. Knight Bruce and *Mr. Rudall*, for the plaintiff.—The question is, what were the rights of Johanna Grant, in reference to the 1,000*l.* bequest—whether she took an absolute interest, or had only a power coupled with an interest for her life. One construction of this will is to read the passage beginning, "I further will, that at the decease of my wife," and ending "Johanna Grant," as if it were a parenthesis, and then there would be an absolute gift, which the subsequent declaration, as to the enjoyment during life, and the power of disposal at her death, would not abridge. There

(1) His residence.

is another construction which refers the words "during her life," "she may dispose of it," not to Johanna Grant, but to Henrietta; and this has been suggested by an eminent counsel, as the true reading of the will.

[*Mr. Jacob*.—If the passage referred to be read as a parenthesis, you must make Johanna Grant a trustee for Henrietta.]

There is no authority for construing the word "dispose" or "disposal," to mean other than an *absolute interest*, unless a special class to take, or a special instrument or mode of executing the power, be pointed out—*Tomlinson v. Dighton* (2), and *Doe v. Thorley* (3). The codicil is very important in explaining the disposition intended by the will; there is no question as to Johanna Grant taking an absolute interest in the 430*l.*; and the words "in addition," "the further sum," "for her disposal," clearly import, that the additional provision is of the same nature as the former gift at his wife's decease.

[The VICE CHANCELLOR.—There are two different gifts to Johanna Grant, by the will; the testator does not in his codicil distinguish either, but refers to the provision he has made for her, in general terms; the gift by the codicil, therefore, cannot be of the same nature as both.]

The testator has here said, "you shall not spend your income;" that is, "you shall not anticipate it by alienation." Testators like the present, who seek not the aid of legal skill, never contemplate any distinction between power and property. In *Doe v. Thorley* the words were "to leave," and all the Bench thought that word signified *ex vi termini*, a disposition by *will*. *Reid v. Shergold* (4) also was decided on the same rule of construction, the appointment by *will* being specially limited.

The following cases were also cited:—

Irvin v. Farrer, 19 Ves. 86.

Jennor and Hardie's case, 1 Leon. 283.

Robinson v. Dugdale, 2 Vern. 181.

Goodtitle v. Otway, 2 Wils. 6.

Elton v. Shephard, 1 Bro. C.C. 532.

(2) 1 P. Wms. 149.

(3) 10 East, 438.

(4) 10 Ves. 370.

Hales v. Margerum, 3 Ves. 299.

Comber v. Graham, 1 Russ. & M. 450.

Simmons v. Simmons, 8 Sim. 22; s. c.

5 Law J. Rep. (n.s.) Chanc. 198.

Doe dem. Herbert v. Thomas, 3 Ad. & El. 123.

Hixon v. Oliver, 13 Ves. 108.

Mr. Jacob and *Mr. Roupell*, for the defendant, Henrietta Ann Wright Place, were not heard (5).

Mr. Greene, for the defendant, John Wright.

The VICE CHANCELLOR.—The words in the present case do not appear to me to give an absolute interest, with a super-added power, as in most of the cases referred to, but a life interest and testamentary power; they seem to negative the possibility of Johanna Grant disposing of the fund during her life, and are very different from the words in *Doe dem. Herbert v. Thomas*.

Mr. Knight Bruce.—With great deference, I think the restraint on alienation good for nothing.

The VICE CHANCELLOR.—That may be, so far as it is a limitation of the *interest*; but it appears to me available as indicative of an intention to prescribe the mode of executing the *power*—viz. by will, and not by writing *inter vivos*. I think, this lady was not to have a power to alienate during her life; and if not, then she took a life interest coupled with a testamentary power of appointment, and having died intestate, Henrietta Ann Wright Place is entitled to the 800*l.* bank 3½*l.* per cent. annuities, in the pleadings mentioned. I would not object, if it were desired, to send a case to a court of law; but there would be great difficulty in framing one that would be satisfactory.

Mr. Knight Bruce agreed as to the difficulty of framing a case, and did not press it.

(5) See *Bradly v. Westcott*, 13 Ves. 445; and *Reith v. Seymour*, 4 Russ. 263; s. c. 6 Law J. Rep. Chanc. 97.

M. R. }
 Jan. 16. } JAMES V. HAMES.

Settlement—Executors—Trust.

By a marriage settlement, some leasehold property of the husband was vested in trustees, in trust for the husband for life, and after his decease, to pay the wife an annuity of 250l. for life, and to pay the residue of the rents unto the executors and administrators of the husband, and after the death of the husband and wife, on trust to sell and pay portions to a limited extent to the children, and to hold the residue upon trust for the executors, administrators, or assigns of the husband, for his and their own use and benefit, and in case of there being no children, to hold the whole trust monies, upon trust for the executors, administrators, and assigns of the husband absolutely for ever. The settlement contained a covenant by the husband to renew the lease and pay the annuity. There were children of the marriage, whose portions did not exhaust the whole trust fund:—Held, on the death of the husband and wife, that the executors of the husband took the residue, not beneficially, but in their representative character.

By an indenture dated the 6th of November 1788, and made between John Hames, of the first part; Grace Hayter of the second part; and George Garrard Hayter and two other trustees of the third part; after reciting that a marriage was intended to be had between James Hames and Grace Hayter, and that John Hames was possessed of certain leaseholds, and that Grace Hayter was entitled to a share in 250l. long annuities, and that it had been agreed that John Hames should become entitled to all the personal property of the said Grace, except her share in the 250l. long annuities, "in consideration whereof, and for making a further provision for the said Grace Hayter, and the issue of the intended marriage, John Hames agreed to assign the leasehold upon the trusts after mentioned;" he, the said John Hames did assign the leasehold to the trustees, upon trust for himself for life, and, after his decease, to pay Grace an annuity of 250l. for life, and to pay the residue of the rents unto the executors or administrators

of the said John Hames; and, after the decease of the survivor, to sell the property and stand possessed of the produce, upon trust to pay to each of the children of the marriage such a sum of money as together with his share of the 250l. long annuities would amount to 1,500l., and in case any such child or children should happen to depart this life under the age of twenty-one years, then as to the portion or portions of him, her, or them so dying under the age of twenty-one years, and also as to the residue of such trust monies to arise from such sale or sales as aforesaid, upon trust for the executors, administrators, or assigns of the said John Hames, to and for his and their own absolute use and benefit; and in case there should be no child or children of the body of the said John Hames on the body of the said Grace Hayter, lawfully to be begotten, or there being such, all of them should die under the age of twenty-one years, then as to the whole of such trust monies, upon trust for the executors, administrators, and assigns of the said John Hames, absolutely for ever. And in the said indenture of settlement was contained covenants on the part of the said John Hames, for renewal of the terms in the said settlement property, for the purposes of the said settlement, and also for payment of the said annuity to the said Grace Hayter; and also a proviso whereby it was declared that so long and during such time as the executors or administrators of the said John Hames should pay the said annuity or clear yearly sum of 250l. unto the said Grace Hayter, at the days and times, and in the manner thereinbefore mentioned and appointed for payment thereof, they, the said trustees, their executors and administrators, should stand and be possessed of the said messuages, hereditaments, and premises, upon trust to permit and suffer the executors or administrators of him, the said John Hames, to receive and take the rents, issues, and profits thereof, to and for their own use and benefit.

The marriage took effect, and there were issue two sons, George and the defendant William. In 1804, John Hames, the settlor, died, and he appointed his widow Grace Hames and G. G. Hayter, his ex-

tors, who duly proved his will. In November 1820, George, the son, died; and Grace Hames, having survived her co-executor, died in 1837, and she by her will bequeathed all her estate to the defendant.

The question in the cause was, whether the surplus of the produce of the leaseholds, after providing for the portions of the children of the marriage, formed part of the residuary estate of John Hames the settlor, or belonged to his executors beneficially.

Mr. Pemberton and *Mr. Rogers*, for the plaintiffs.

Mr. Kindersley and *Mr. Heberden*, for the defendant.

The Master of the Rolls took time to consider his judgment.

Jan. 16.—The MASTER OF THE ROLLS [after stating the case,] said, that the object of the settlement was plainly to make a provision for the wife and children, and to invest the trustees with ample powers for that purpose, and that upon the true construction of the settlement, the executors were entitled to the surplus in their representative character, and not beneficially.

Note.—On the subject of executors and trustees taking beneficially, see *Sanders v. Franks*, 2 Mad. 147; *Collyer v. Squire*, 3 Russ. 467, s. c. 5 Law J. Rep. Chanc. 186; *Wellman v. Bowring*, 3 Sim. 328, s. c. 1 Law J. Rep. Chanc. 27; *Stocks v. Dodsley*, 1 Keen, 325; *Wood v. Cox*, 1 Keen, 317, s. c. 2 Myl. & Cr. 684, 6 Law J. Rep. (N.S.) Chanc. 366; *Palin v. Hills*, 1 Myl. & K. 470, s. c. 2 Law J. Rep. (N.S.) Chanc. 142; *Bridge v. Abbott*, 3 Bro. C.C. 224; *Charles v. Evans*, 1 Anst. 128; *Nurse v. Oldmeadow*, 5 Law J. Rep. (N.S.) Chanc. 300; *Stubbs v. Sargon*, 6 Law J. Rep. (N.S.) Chanc. 254, s. c. ante, 95; *Wallis v. Taylor*, 6 Law J. Rep. (N.S.) Chanc. 68.

V. C. { *GIBBS v. HOOPER.*
Jan. 20. { *GIBBS v. BURSLEM.*

17 Geo. 3. c. 26—*Annuity Deed—Memorial.*

In the memorial of an annuity deed, the amount of the annuity was in some places stated to be 77l., and in others to be 73l. 5s.;

and the consideration money was in some places stated to be 450l., and in others, to be 455l.; and the names of persons were stated to be indorsed on the deed, as witnesses to its execution by the grantee and his trustee, whose names were not in fact indorsed on it:—Held, that the memorial did not represent the transaction with sufficient accuracy, and that the grant of the annuity was consequently void.

The plaintiffs sought to set aside a grant of an annuity of 77l. for ninety-nine years, if the grantor should so long live. The annuity in question was granted by a deed, dated the 16th of January 1812; and in the recitals which stated the agreement to grant the annuity, and in the first witnessing part, by which it was granted and charged on certain freehold estates, the amount of it was uniformly stated to be 77l., and the consideration was stated to be 455l. But in the second witnessing part, the grantor demised the estates charged with the annuity, to a trustee for 200 years, "for further, better, and more effectually securing the payment of the said annuity of 73l. 5s., thereby granted." In the covenant by the grantor to pay the annuity, the amount was stated in the deed to be 77l., but in the memorial it was mentioned as 73l. 5s. The memorial stated, that the subscribing witnesses to the execution of the deed by the grantee were W. G. and G. H., and that the subscribing witness to its execution by the trustee was the said G. H., but there was no indorsement on the deed, of the names of either of those persons. A receipt for 455l. was indorsed on the indenture. A warrant of attorney for entering up a judgment as a security for the annuity, was stated in the memorial to be for entering up a judgment for 900l., as a security for an annuity of 77l.; and the memorial also stated, that "the true and *bonâ fide* consideration advanced and paid for the purchase and grant of the said annuity, was 450l., and the said sum of 450l. was paid to" the grantor, by the agent of the grantee, in notes of the Bank of England. The question, as to the validity of the annuity deed, was argued upon exceptions to the Master's report, the Master being of opinion

that the grant was not valid, on the ground that the provisions of the 17 Geo. 3. c. 26. had not been complied with.

Mr. Jacob and Mr. S. Sharpe, for the exceptions.—The amounts of the annuity and consideration money are correctly set out in the recitals, and in the operative part of the deed; and it is not required that the memorial should state those points more than once. The statement, therefore, in the memorial, in which the sums are incorrectly set forth, may be rejected as surplusage, or may be disregarded as a clerical error. They cited—

Cousins v. Thompson, 6 Term Rep. 335.

Ince v. Everard, *ibid.* 545.

Hodges v. Money, 4 Term Rep. 500.

Somerby v. Harris, *ibid.* 494.

Wyatt v. Barnwell, 19 Ves. 435.

Browne v. Rose, 6 Taunt. 124.

Orton v. Knight, 3 Bos. & Pul. 153.

As to the statement in the memorial respecting the execution of the deed by the grantee and his trustee, in the first place it is immaterial whether those parties did execute it or not; and in the next place, they may have actually executed it in the presence of those persons, although their names were not indorsed on the deed. In *Ex parte Mackreth* (1), it appeared plainly that the memorial could not be true, but this case is quite different.

Mr. Knight Bruce and Mr. Montague, appeared for the plaintiffs.

The VICE CHANCELLOR.—Where a memorial sets forth the consideration by way of recital, it is substantially a setting forth of what the consideration was: that has been very clearly decided. But in this case, the memorial not only sets forth the whole of the deed by way of recital, and so shews the consideration to have been 455*l.*, but it does substantially aver, that “the true and *bond fide* consideration advanced and paid for the purchase and grant of the said annuity was the sum of 450*l.*” Now, if the memorial had gone on to say, that the said sum of 455*l.* was paid, I could have understood that you might

have said, “there is a clerical error on the face of the memorial;” because where it speaks of some sum, and then goes on to say, 455*l.*, it would, on comparing all parts of the memorial together, appear merely a clerical error. But it is no such thing in this case. The memorial asserts, that the true and *bond fide* consideration was 450*l.*, “and the said sum of 450*l.* was paid,” &c. Therefore, here is a substantive averment in one part of the memorial, that the consideration was one sum; and then there is an averment, by way of recital, that the consideration was a different sum; therefore you have a memorial not truly setting out what the consideration was, as it states it in one place to be one thing, and in another place to be another thing; my opinion therefore is, that this is a good objection, and that it applies to the whole transaction, to the power of attorney and the judgment, as well as to the grant itself.

And, I must say, that as to the point of witnesses, that would of itself affect the validity of the deed. The act is not complied with, when in addition to the names of the real witnesses, other names are introduced (2), because it is an untrue representation of the mode in which the transaction was carried on. And where it is not known who was the true witness, and a person of respectability, who was not a witness, is mentioned as having been one, the memorial does represent the thing in a manner likely to deceive. If you proceed to act on it, it must give endless confusion and trouble. On the first point, the annuity is clearly bad.

Exception overruled.

(2) By the 1st section of the act, it is enacted, “That every memorial shall contain the day of the month and the year when the deed, bond, instrument, or other assurance bears date, and the name of all the parties, and for whom any of them are trustees, and of all the witnesses, and shall set forth the annual sum or sums to be paid, and the name of the person or persons for whose life or lives the annuity is granted, and the consideration or considerations of granting the same;” otherwise, every such deed to be void.

(1) 2 East, 563.

M.R. }
Feb. 24. } DORIAN v. LIVINGSTONE.

4 & 5 Will. 4. c. 82—Construction—
Slave Compensation Money.

Service of a subpoena in Jamaica, ordered, where the subject of the suit was slave compensation money.

Mr. Roupell moved for an order under this act, that service of a subpoena on Mr. Dewdney, a defendant, in Jamaica, might be good service. The subject-matter of the suit was slave compensation money which had been awarded and paid into court, and invested in the funds.

The MASTER OF THE ROLLS, after referring to the act, made the order.

Note.—It is right to state, that his Lordship's attention was not called to the second slave compensation rule, which declares, that in respect of all persons interested in any slave, the compensation money shall be deemed of the same nature, and impressed with the same character. This would impress the compensation money with the character of real estate in Jamaica, to which the act in question does not extend.

V.C. }
Feb. } TENCH v. CHEESE AND STEPHENS.

12th New Order, (May 1837)—Construction—Costs.

Where, after the new orders of 1837, a party moves in a cause, he is bound to see that the motion is made before the proper Judge: and if, therefore, he makes an application in the wrong court, it will be refused with costs, even in a case where the last order in the cause on the merits, was made in respect of another defendant.

Mr. Bayley, on behalf of Stephens, one of the defendants, moved to dismiss this bill for want of prosecution.

Mr. Beavan objected that this motion under the 12th order 1837, section 3, ought to have been made at the Rolls; the last order upon merits shewn by answer, namely, an order for the defendant Cheese to produce papers, admitted by his an-

swer to be in his possession, having been made at the Rolls. He asked for the costs of this motion.

Mr. Bayley, in reply, insisted that as the order at the Rolls had not been made against his client, and as he had no notice of it, no costs ought to be given; but—

The VICE CHANCELLOR said, he knew it to be the opinion of the Lord Chancellor, that those who made applications after the orders of 1837, were bound to see that they were made in the proper place: he therefore refused this motion *with costs*.

M.R. }
Feb. 26. } BARLOW v. SEWELL.

Pleading—Amended Bill—Parties.

A plea to the whole amended bill, after a full answer to the original bill, under the circumstances allowed.

The plaintiff was entitled to one-fourth of a residue as assignee of J. B, and to one other fourth in right of his wife; by his original bill, to which his wife was no party, he left it in ambiguity whether he claimed in right of his wife as well as assignee of J. B. The defendant put in a full answer, stating the ambiguity, and suggesting, that if the plaintiff claimed in right of his wife, she ought to be made a party. The plaintiff amended, and then distinctly claimed in right of his wife. The defendant then pleaded to the whole bill, that the wife's property was settled on her marriage, and that the trustees of the settlement ought to be made parties:—Held, regular.

Where a plea for want of parties, points out the class of persons who ought to be made parties, it is not necessary to aver that they are living.

The plaintiff, Thomas Hewett, was entitled in right of his wife Ann, to one-fourth of the residuary estate of the testatrix; and, as assignee of J. Barlow, he was entitled to another fourth part thereof: the parties entitled to the remaining two fourths had received their shares, and executed releases. By the original bill, to which his wife was not made a party, the

plaintiff sought an account of the testatrix's estate, and that the residue might be ascertained, and for an account and payment of what was due to the plaintiff, but the bill was ambiguously framed as to the claim of the plaintiff in respect of his wife's share.

The defendant Sewell, who was the surviving executor, after stating a settlement of accounts with the plaintiff's wife, previous to her marriage, submitted, "whether the plaintiff, Thomas Hewett, or the said Ann Newen, his wife, could make any claim in respect of her share of and in the residuary personal estate against the defendant; the defendant, however, submitted that the bill was ambiguously framed in respect of such claim, and as the defendant believed purposely and delusively, and that the plaintiff ought not to be allowed to prosecute the suit against the defendant under such ambiguity, inasmuch as the defendant was entitled to be absolutely released in respect of such claim, or otherwise to have the accounts prayed for by the said bill taken finally and collectively, and not piecemeal; and the defendant submitted, that under the circumstances aforesaid, the suit was defective in not seeking such account accordingly, for which purpose Ann Newen Hewett ought to be made a party and co-plaintiff in the bill."

The plaintiff afterwards, by amendment, made his wife a party, and he then distinctly claimed her share. To this bill, as amended, the defendant pleaded, and stated, that by a settlement made on the marriage of the plaintiff and wife, the one-fourth share was assigned to two trustees J. H. and H. G. upon certain trusts for the plaintiff, his wife, and their children; and it averred, "that the amended bill of complaint was altogether improper and defective, by reason that the said trustees, under the said indenture of settlement, were not made parties to the said amended bill of complaint, and the defendant pleaded the matters aforesaid to the whole of the said amended bill of complaint." The plea did not, however, aver that the trustees were living.

Mr. Pemberton and Mr. O. Anderson, in support of the plea.

Mr. Piggott, contra, raised three objections to the form of the plea: first, that it was a second dilatory, which the rules of pleading did not permit—*Anonymous* (1) referred to by Lord Eldon in *Ritchie v. Aylwin* (2); secondly, that the plea did not contain proper averments, for it ought to have averred that the trustees were living, and that there were no children of the marriage, analogous to a plea in abatement at law—*Chitty on Pleading*, 3rd edit. 442, *Cabell v. Vaughan* (3), where it was held, "that if in debt on bond, it appears upon oyer that another person is mentioned in the bond to be bound jointly with the defendant, he must plead that the other person sealed the bond, and is still alive," and see *Ib.* 291, a, n. 2; thirdly, that the plea was overruled by the answer already put in, it being impossible that a plea and answer to the whole bill could stand together—*Atkinson v. Hanway* (4), which was a similar case of a demurrer to an amended bill after an answer—*Noel v. Ward* (5).

Mr. Pemberton, in reply, contended, that the full answer to the original bill could not be considered a dilatory, and, therefore, this plea was not a second dilatory; secondly, that it was not material to aver that the trustees were living, for if they were dead, their representatives were then necessary parties, and it was sufficient to point out the class who ought to be made parties; thirdly, that the plea for want of parties, could not have been put in to the original bill, because the plaintiff did not thereby distinctly make claim to the share of his wife, and the objection being first raised by the amendment, the defendant was entitled to take advantage of it by plea.

THE MASTER OF THE ROLLS.—In this case, the original bill was filed, asking relief as to one-fourth part of the estate of the testatrix in the cause, and was expressed, as I understand it, ambiguously, with respect to another fourth. The defendant put in a full answer to the original bill, in

(1) *Moseley*, 207.

(2) 15 Ves. 79.

(3) 1 Saund. 291.

(4) 1 Cox, 360.

(5) 1 Mad. 322.

which answer he made the objection, that the bill was ambiguously framed as to the share to which the plaintiff Hewett might be entitled in right of his wife, and suggested that Hewett's wife should be made a party. He said, 'I think it is intended to deceive me, and the bill ought not to be prosecuted in its present form,' and if so, the wife ought to be a party. The plaintiff then thought fit to amend the bill; he removed the ambiguity, making a distinct claim for the fourth part of the property to which Hewett would be entitled in right of his wife. He thereby admitted that the original bill had been so framed, as not to entitle them to relief, in respect of that share to which they did not set up a claim. Therefore, the amended bill seeks relief distinct from that sought by the original bill. To this bill a plea is put in, by which it is stated, that a settlement was made on the marriage of the plaintiff with his present wife, and by that settlement her share was vested in trustees upon certain trusts, and alleges that the trustees ought to be parties. The first objection which is made to this plea, it being admitted that the persons interested under the settlement must be parties, is, that it is a second dilatory. I cannot think a full answer to a bill can be a dilatory. The answer to the original bill was a substantial and full answer to that bill, but expressed a doubt whether the plaintiff intended to claim under his wife, and if so, it suggested that certain persons ought to be made parties. I think, therefore, this objection is not to be maintained. The second objection is, that being a plea for want of parties, it ought to aver that the trustees are living, and shew that there were no other parties who could be required. It does not appear that this can be the rule. If the class of persons who ought to have been made parties be pointed out, it is not necessary to say that they are living. No authority can be produced for this objection, and I do not think it can be sustained. The third objection is, that the plea is overruled by the answer to the original bill. Now, the second bill has a claim for relief, which the plaintiff admits could not be sustained by the first bill, because the amendment of the bill admits that he was not entitled to relief, in respect of Mrs. Hewett's share; therefore, I do

not think that this particular plea is overruled by the answer. I am not confident on the point, and would look into the circumstances, but it is only a question of costs, as it is admitted that the bill must be answered, and that these persons must be made parties.

V.C.
Feb. 14, 15; } HUTCHINGS v. SMITH.
Mar. 26.

Baron and Feme—Chose in Action—Assignment—Solicitor.

A husband was entitled in right of his wife, to a share of a testator's estate, for the administration of which a suit had been instituted in equity, but no decree had been made. The husband and wife joined in assigning her share to secure a debt due from the husband:—Held, that this assignment was not binding on the wife, having survived her husband.

An agreement by a widow to pay a solicitor's bill due from her late husband, out of a fund in court belonging to her, entered into under the erroneous impression that she was bound to pay it, was set aside.

The plaintiff, Ann Hutchings, widow, was beneficially entitled, under the will of a Mr. Herbert, to one-fifth of the residue of his real and personal estate, and as administratrix of a deceased brother, she was also entitled to another fifth of the same estate. A suit had been instituted in this court for the administration of Mr. Herbert's personal estate; and while this suit was pending, and before the amount of the plaintiff's share had been ascertained, namely, on the 17th of November 1830, the plaintiff and her husband, Joseph Hutchings, executed an indenture of assignment of the share of the plaintiff in Herbert's estate and effects, under his will, or under any order which might be made in the said suit, unto two of the defendants named Langton, for securing the payment of 414*l.* then due to them from Joseph Hutchings, and any further sum which might become due from him to them, not exceeding in the whole 500*l.*, with interest for the same.

This assignment was prepared by Mr. Smith, a solicitor, the first-named defendant on the record, who was the solicitor of Messrs. Langton; and no other solicitor was employed in that transaction. A second suit was also instituted for taking an account of Herbert's real estate.

Joseph Hutchings died in November 1831, insolvent.

On the 9th of August 1834, an order was made in both suits upon further directions, by which, among other things, one-fifth of certain bank annuities (such fifth amounting to about 815*l.* consols) was ordered to be transferred to the plaintiff in her own right, and another one-fifth as administratrix of her deceased brother.

On the 18th of the same month of August, the plaintiff, at the request of Mr. Smith, called on him, and was then first informed of the above-mentioned order having been made in her favour; and she then signed a memorandum, which Mr. Smith had previously drawn up, in the words following, "Memorandum. Whereas, by a certain deed of assignment bearing date the 17th of November 1830, and made between my late husband, Joseph Hutchings, deceased, and myself, of the one part, and Messrs. Langton of the other part, certain funds payable to me under the will of Watkins Herbert, were assigned to the said Messrs. Langton, in trust to secure payment of 414*l.* and interest thereon. Now, in consideration of the said Messrs. Langton having agreed to waive presenting a petition to the Court of Chancery, I do hereby agree to ratify and confirm the said deed of assignment, and the several trusts therein mentioned, and do hereby promise and agree to and with the said Messrs. Langton, to pay unto them the said sum of 414*l.*, and interest, secured by the said deed of assignment, within five days from the date hereof. Dated this 18th of August 1834."

And on the same day, she also signed another memorandum as follows, "Memorandum. In consideration of Mr. James Smith not presenting a petition to the Court of Chancery, to prevent my receiving the funds payable to me in a cause *Conden v. Lord*, I hereby undertake to pay to the said James Smith the sum of 43*l.* 6*s.* 7*d.*, being the amount of his bill of

charges against my late husband and myself, within five days from this date. Dated this 18th of August 1834."

On these memoranda, two actions were brought against the plaintiff; the first on the 4th of September, by Messrs. Langton, for the recovery of 414*l.* and interest; and they caused her to be arrested on the 6th of the same month; and while she was under arrest, Smith brought a second action against her for 43*l.* 6*s.* 7*d.*, and lodged a detainer against her. But before these actions were brought, the plaintiff had had the amount of her share of the testator's estate transferred into her own name.

On the 6th of November 1834, the plaintiff filed this bill, insisting that the assignment of her share in the estate of the testator, was inoperative as against her, (she having survived her husband,) as it related to a chose in action of the wife's, which was then incapable of being reduced into possession; and also insisting that the memorandum was invalid, because it was signed by her before she had been informed that the assignment was void, and while she was ignorant of what rights she had, and without any opportunity of consulting any of her friends.

The bill prayed, that the two memoranda might be declared void, and might be delivered up to be cancelled; and that the defendants might be respectively restrained from taking any further proceedings at law against her by virtue of the memoranda, or either of them.

Mr. Knight Bruce and *Mr. Moore*, for the plaintiff.—Whether the plaintiff is or is not entitled to the whole of the property now in dispute, in consequence of her having survived her husband, it is plain that she is entitled to a settlement out of it. A husband may effectually dispose of his wife's chattels real, whether in possession or reversion—

Lord Carteret v. Paschal, 3 P. Wms. 197.

Bates v. Dandy, 2 Atk. 207.

Lord Salisbury v. Newton, 1 Eden, 370.

But the law on this subject has undergone revision since those cases were decided; and it is now established, that as against a wife surviving, a husband is not capable of making a valid assignment of her interest in a chose in action, being pure per-

sonality, which is not capable of being reduced into possession—

Mitford v. Mitford, 9 Ves. 87.

Hornsby v. Lee, 2 Mad. 16.

Pierce v. Thornely, 2 Sim. 167.

Honner v. Morton, 3 Russ. 65.

Chapman v. Curtis, 5 Byth. Conv. by Jarman, 572, n.

Roper on Legacies.

Mr. Jacob and *Mr. Bethell*, *contrà*, contended, that as there was not any prior interest in this property, and as the fact that the property could not be reduced into possession, was merely owing to the accident of a suit being instituted, and of some delay being consequently occasioned in the payment of the money, the assignment by the husband could not be defeated by the wife, although she survived; and that part of the fund arose from the sale of real estate, and as to that part the husband could at all events make a valid assignment.

Duke of Chandos v. Talbot, 2 P. Wms. 608.

Bash v. Dalway, 3 Atk. 530.

Purdew v. Jackson, 1 Russ. 1; s. c. 4 Law J. Rep. Chanc. 1.

Johnson v. Johnson, 1 Jac. & W. 472.

Burnett v. Kinaston, Prec. in Ch. 119.

Wall v. Tomlinson, 16 Ves. 413.

Baker v. Hall, 12 Ves. 497.

Mr. Wakefield and *Mr. Koe*, for *Mr. Smith*.

The VICE CHANCELLOR said, he thought the bill must succeed as to that part of the bill which asked for the delivery up of the memorandum given to *Mr. Smith*. He ought not to have obtained it, without fully explaining to the plaintiff that she was not bound to pay the costs for which it was given; and the Court must give the costs of so much of the suit as sought to set aside that memorandum.

Mr. Knight Bruce, in reply, on the other question.

March 26. — The VICE CHANCELLOR, after stating the case, and referring to *Lord Salisbury v. Newton*, and *Bates v. Dandy*, observed — that this case was

distinguished from many others, by the circumstance of there being a decree in favour of *Mrs. Smith*, by which the fund in court was ordered to be paid to her, and that as much effect ought to be given to this decree, as was given by *Lord Henley* to the decree in *Forbes v. Phipps* (1). The *Langtons* did not present any petition to the Court to prevent the plaintiff having the money; nor were they parties to the memorandum, and they were therefore at liberty to repudiate it if they thought proper. His Honour was therefore of opinion, that the memorandum was not good, and ought to be given up, and that the defendants must pay the costs.

M. R. }
Mar. 26. } LOGAN v. DOWBINSON.

Opening Biddings.

Biddings opened at the instance of a party to the cause, who had had liberty given to bid at the former sale, and who was aware of the amount of the reserved bidding, on an advance of 150l. on 1,650l.

It appeared that *Dowbinson* had liberty given to bid at the former sale, and that he was cognizant of the amount of the reserved price being fixed by the Master.

Mr. Teed moved, on behalf of *Dowbinson*, to open the biddings on an advance of 150l. on 1,650l. He contended, that the liberty to open was for the benefit of the parties entitled, and not a favour extended to the party applying. He cited—

Lefroy v. Lefroy, 2 Russ. 606.

Hooper v. Goodwin, Coop. Rep. 95.

Mr. Pemberton, *contrà*.

The MASTER OF THE ROLLS said, that he could not think that *Dowbinson* had altogether acted right, as he had been a party to the reserved bidding; but, as the Court opened biddings for the benefit of the suitor, he could not refuse the application.

(1) 1 Eden, 502.

L.C.
March 10, 28, 30. } WILSON v. BATES.

Contempt—Lord Bacon's Orders—Practice.

A plaintiff, though in contempt for non-payment of costs to the defendant, may nevertheless issue an attachment against the defendant for want of answer.

The plaintiff, before answer, moved for an injunction, which application was refused, with costs; and the costs being taxed, he was taken under an attachment for non-payment of them. The plaintiff, being still in custody, and in contempt, for non-payment of these costs, issued an attachment against the defendants for want of answer to the bill. The defendants then moved, before the Vice Chancellor, to set aside the attachment against them for irregularity, and to cancel the bail-bonds given by them; but his Honour, after having been furnished with the certificate of the Six Clerks as to the practice, refused the application.

Mr. Wakefield and Mr. G. L. Russell now renewed the same motion before the Lord Chancellor.—By the 78th of Lord Bacon's orders—"They that are in contempt, especially so far as proclamation of rebellion, are not to be heard, neither in that suit, nor in any other, except the Court of special grace suspend the contempt." This order is still in force, and is directly applicable to the case of the present plaintiff. The plaintiff is in contempt, and how can he, in the face of that order, take one single step in the prosecution of his cause? The order is wrongly printed in some of the books. The proper words are, "not to be here," and not merely "not to be heard," and the plaintiff cannot obtain this attachment without coming *here*. He comes to the Court for it, and the terms of the order for the attachment are, "by the Court." All the six clerks have certified, that they would not have sealed an attachment under these circumstances, and the registrars, with one exception, have done the same.

Mr. Bethell, contra.—There is no other authority but Lord Bacon's order; and it is notorious that the construction of these orders is restricted by the modern practice. Those familiar with the language of

Lord Bacon's time, can see that all turns upon the word "especially."

[The LORD CHANCELLOR.—But that construction would put an end to all disability on account of contempt, unless in respect of a proclamation of rebellion.]

Lord Bacon's order has never been followed literally. By being in prison, the plaintiff is in fact submitting himself to the process of the Court; and his poverty alone may prevent him from paying costs. In practice, the fact of being in contempt has not prevented a plaintiff from bringing his cause to a hearing, or from making a motion in the cause. In *Wild v. Hobson* (1), the plaintiff was in contempt for non-payment of the costs of a motion, at the time the cause was brought to a hearing, but nobody took the objection. The fact of the plaintiff being then in contempt does not appear upon the report of that case; but it appears from the registrar's book. The Court must be aware of cases in which the costs of one contempt have been set off against those of another, although it is obvious that each party must have laboured under the disability here insisted on—*Ricketts v. Mornington* (2). When this case was before the Vice Chancellor, he remarked, that the certificate of the six clerks went upon a theory of their own, not founded upon any definite practice. The attachment for want of an answer issues as a matter of course—*Beames's Orders*, 117. So that, in terms, this does not come within Lord Bacon's order. The plaintiff did not want to be "heard;"—he made no application. The defendants have sued out a commission—executed it—sworn their answer—all which proceedings would, in analogy to the rules by which plaintiffs are bound, disqualify them from insisting upon the contempt—*King v. Briant* (3). The defendants ought not to have waited till the time for answering had expired, but should have moved to stay all proceedings. That is the proper and usual course.

Wakefield, in reply.—The question simply is, whether the plaintiff, being in contempt, can come to the Court, and proceed

(1) 4 Mad. 49.

(2) 2 Sim. 200; a. c. 4 Law J. Rep. (N.S.) Chanc. 21.

(3) Ms. L.C. Jan. 31st, 1838, post.

with his suit. He is not brought here by the defendant. The sound construction of the order is, that a party in contempt cannot *originate* any proceeding, but that he may defend. There must be some mistake in *Ricketts v. Mornington*. See *Bellchambers v. Giani* (4), and observe the language of Chief Baron Gilbert, *Forum Romanum*, p. 102.

The LORD CHANCELLOR.—It is extraordinary that there should be so little authority on either side. There are instances in the cases cited by Mr. Bethell of the six clerks having done that which, by their certificate, they say they have not done. I am not disposed to extend the practice, that parties in contempt shall not proceed.

March 30.—The LORD CHANCELLOR.—The question raised on this application was, whether the plaintiff, being in contempt for non-payment of money for costs, which he was directed to pay, could issue an attachment against the defendants for not answering the bill; and this involves the question, whether he can take any step in the cause, for if he could not compel an answer, of course the cause is virtually stopped.

No case upon the point was produced in which it was decided. Lord Bacon's order, which is the foundation of the practice, can only be construed from the practice which has prevailed since Lord Bacon's time, for it is quite obvious that if it were acted upon, according to its strict terms, the practice would be very different from the present. The question is, whether, according to the present practice, a plaintiff being in contempt for non-payment of costs, is prevented being heard, that is, whether as regards that suit he is to be placed in the situation of an outlaw. I confess, if the point now for the first time called for a decision, I certainly could not lay down any such rule, and impose on a party who may not be able to pay the costs of a refused motion, a restraint which would stop him from asserting his rights. But, if the practice has been established, I cannot alter it.

That a party in contempt cannot be heard to make a motion, is a practice of

frequent occurrence; but he is allowed to be heard upon a motion to get rid of the order placing him in contempt, though there is no excepted case in Lord Bacon's order; but, if he can be heard at all, it seems inconsistent with Lord Bacon's order.

The real inquiry, therefore, is, what has been the present practice? As to decision, it appears there is none. A certificate, signed by a number of the clerks in court, has been stated, but founded on no case or authority; they, however, state that a party in contempt cannot do that which the plaintiff has done in the present instance. The certificate is valuable, from the experience of those individuals as to what they consider to be the universal practice; but if I find the practice not to be so before Lord Bacon's orders, and not universal since, its value entirely fails. They state, that if a plaintiff gets into contempt, the cause is absolutely stopped; and that they would not be authorized to take any proceeding for the plaintiff. If that were the case, the plaintiff in contempt could never bring his cause to a hearing without clearing his contempt. There is an authority against this in the case of *Wild v. Hobson*, where this very question arose. The plaintiff, in that case, had made two motions to enlarge publication, and failing in both, he was ordered to pay the costs, and attachments afterwards issued against him for non-payment of these costs. This took place on the 6th of November 1818; but, according to what is stated to be the practice, no proceeding could be taken by the plaintiff after the first attachment; yet, it appears that the cause actually came on for hearing on the 29th of January 1819, the plaintiff being then in contempt. Now, testing the accuracy of the six clerks' certificate, the plaintiff being in contempt could not go on to hearing; yet, in this case, he did, and it appears that the costs of his contempt were made matter of arrangement, and were provided for in the decree. I also find, that, in the case of *Ricketts v. Mornington*, before the present Vice Chancellor, the precise thing occurred. There the plaintiff in contempt had brought on his cause to a hearing; but, according to the certificate of the six clerks, how could he have done it? It was objected, that he

could not be heard because he was in contempt; the Vice Chancellor, however, overruled the objection, and the plaintiff was heard. This decision, it appears, was acquiesced in, and no application was made to review the decision of the Vice Chancellor. So much for what is said to be the universal practice of not permitting a plaintiff to go on with his case. Here are two reported cases, where the course which it is stated could not be adopted, was actually followed.

There are cases also, where, the plaintiff being in contempt, the defendant has applied to the Court to stay further proceedings, until the costs of the contempt have been paid. These applications would have been useless, if the practice were as stated, for then the defendant might remain passive. Such, however, is not the course adopted either by the Court or by the parties; for the Court, on an application for that purpose, makes an order staying proceedings until the costs have been paid; it makes a special order to restrain the plaintiff from doing that which the certificate says he cannot do. In *Eddowes v. Neville*, before Lord Hardwicke, in Trinity term, 1745, according to the note with which I have been furnished by the registrar, the defendant moved, that all proceedings under a writ of execution of the decree, might be suspended until the plaintiff should have paid certain costs, for non-payment of which she was in prison; and the Attorney General, on behalf of the plaintiff, thereupon applied, that an attachment might issue against the defendant, and the Court made a special order adjudicating upon the whole matter. So, in another case of *Price v. Dalton*, before the same Judge, upon a motion by the defendant, that all proceedings, for want of answer, might be stayed until the plaintiff had paid certain costs, the Court gave the defendant three weeks time to answer after the costs should have been paid.

In the absence of all authority for what is stated to be the universal practice—with the cases I have referred to, which, though not expressly in point, instead of being in accordance with the certificate, are the very reverse; and, having no disposition whatever to change the practice of the Court with reference to Lord Bacon's orders, I am of opinion, that the Vice Chan-

cellor was right in his decision; and the motion must, therefore, be refused, but without costs.

M. R. }
Mar. 26. } JACKSON v. NOBLE.

Will—Construction—Rule in Shelley's case.

Devise and bequest to trustees of freehold, leasehold, copyhold, and personality, upon trusts, which were declared, of the freehold, leasehold, and personality only:—Held, that the cestui que trust was not interested in the copyholds which descended to the customary heir.

A testator gave real and personal estate to his daughter A B and two other persons, upon trust, to permit A B to use the rents and interest for life for her separate use, and after her decease, in trust, to convey to her heirs, executors, &c.; but, in case A B should marry, and have no children, then the property to belong to C D, or, in case of his decease before A B, then to his children. C D died in the lifetime of A B, leaving no children:—Held, that A B was absolutely entitled to the property.

The testator in this case devised and bequeathed all those his *freehold* estates in Upton Lane and Golden Lane, and also his moiety of his *copyhold* messuages, &c. at Westham, and also his leasehold estate in Philip Lane, and 1,000*l.* consols, unto "his daughter Mary Ann Russen, Matthew P. Davies, and George William Russen, their heirs, executors, administrators, and assigns, to have and to hold the said last-mentioned *freehold* and *leasehold* messuages, tenements, estates, and premises, with their several and respective appurtenances, and the 1,000*l.* stock, unto his said daughter Mary Ann Russen, the said Matthew P. Davies and George William Russen, their heirs, executors, administrators, and assigns, for and according to his several estates, right, interest, and term of years therein respectively, in trust to permit and suffer his said daughter Mary Ann Russen and her assigns, to receive and take the interest and dividends of the said 1,000*l.* stock, and the rents, issues, and profits of the said several last-mentioned

estates, for and during the term of her natural life, to and for her own separate personal and peculiar use and benefit, independent of any husband, with whom his said daughter should or might at any time or times thereafter intermarry, and not to be subject to his or their debts, power, controul, engagement, or intermeddling; and for which her receipts alone should, from time to time, and at all times thereafter, be full, good, and sufficient discharges, notwithstanding any such coverture, and in such and the like manner as if she had continued a feme sole and unmarried, and that to all intents and purposes whatsoever; and from and after the decease of his said daughter, in trust to convey and assign the said several last-mentioned freehold and leasehold estates, and the said 1,000*l.* stock, unto the heirs, executors, administrators, and assigns of his said daughter, for and according to all his estate, right, title, and interest therein respectively. Nevertheless, in case his said daughter should intermarry, and have no child or children, then the said estates and money in the funds should belong to his said son G. W. Russen, or, in case of his decease before his daughter, then to such child or children as he might happen to have, share and share alike."—And the said testator empowered his said daughter, during her life, to grant leases of all or any part of his said last-mentioned freehold and leasehold estates: and he gave all the residue of his estate and effects to his son, G. W. Russen.

By a codicil, the testator gave a further sum of 1,000*l.* 3*l.* per cent. reduced, to Mary Ann Noble, subject to the like terms and conditions as mentioned in his will. After the death of the testator, G. W. Russen, who was his heir-at-law, and customary heir, alone proved the will, and afterwards died without ever having had any issue. Mary Ann Noble intermarried with a Mr. George Noble, who died leaving Mary Ann Noble, who had no children.

It appeared that, after the testator's death, a house, which formed part of his freehold property, was condemned as ruinous, and pulled down, and rebuilt with the produce of the sale of the 1,000*l.*, which was sold out by the executor, G. W. Russen, for that purpose; and his sister M. A. Russen, by deed, assigned the rents

to her brother, in trust to keep up a policy on her life for the 1,000*l.*, and to apply the produce and residue of the rents in replacing the 1,000*l.* stock so sold out, which she also covenanted to replace.

The plaintiffs were parties claiming under the will of G. W. Russen; and the question in the cause was as to the extent of the interest to which the testator's daughter, Mary Ann Noble, in the events which had happened, was entitled in the property bequeathed by the will.

On the behalf of the plaintiffs, it was contended, first, that Mary Ann Noble took a life interest only in the freehold and leasehold estates, and the two sums of stock bequeathed by the will and codicil of David Russen; and having married, and having no child, G. W. Russen became, and those who claim under him were entitled absolutely to those estates and stocks, subject only to the life interest of Mary Ann Noble, and the contingency of her still having issue.

Secondly, that, although there was a gift of the copyhold, together with the freehold and leasehold, to the trustees, yet the trusts for Mary Ann Russen were declared as to the freehold and leasehold; and that there was no such declaration of trust as to the copyhold, and that, consequently, the beneficial interest therein descended to G. W. Russen, the customary heir.

Thirdly, that Mary Ann Noble was bound, by her covenant, to replace the 1,000*l.*; and that the rents of the freehold and leasehold devised to her, ought to be applied for that purpose.

On the other hand, it was contended, on the part of Mary Ann Noble,—first, that, according to the true construction of the will, she took an absolute interest in the property devised and bequeathed to her, subject only to an executory devise over in the event of marrying, and having no child; that, if she had never married, she would have had an absolute power over the property, and, in the event of her marriage, it was intended to protect her estate from the husband; and, in the event of having no child, the gift over of the property was to her brother and his children *surviving*; and that the event having happened of her brother dying without a child, she was now absolutely entitled.

Secondly, that the omission of the word "copyhold" in the habendum, and in the declaration of trust, was an accident or mistake, which this Court would relieve from; and that G. W. Russen, by his will, and otherwise, admitted Mrs. Noble to be entitled to the copyhold under the will of David Russen.

Thirdly, that the 1,000*l.*, sought to be replaced, was the property of Mrs. Noble; and, if it was not so, that G. W. Russen, in omitting to keep up the policy, had abandoned his claim to it.

Mr. Tinney and *Mr. Elderton* for the plaintiffs.

Mr. Pemberton and *Mr. Turner* for the defendant.

Mr. Tinney, in reply.

Brounker v. Bagot, 1 Mer. 271.

Austen v. Taylor, Amb. 376.

Lynn v. Ashton, 1 Russ. & M. 188—were cited.

THE MASTER OF THE ROLLS, after stating the circumstances of the case, proceeded—The first question is, what estate is given by the will to Mrs. Noble? and, is she entitled to an estate for life only, or to an absolute estate, subject to be defeated by a contingent executory gift over? If the former, the plaintiffs are entitled to the claim which they have made in this respect; if the latter, it is to be considered, whether the event, on which the executory gift over was to take effect, can now happen. It was admitted, on both sides, that Mrs. Noble took an equitable estate for life during her life. It is the office of the trustees to preserve for her separate and independent use that income. After her decease, it is the office of the trustees to convey and assign all the testator's interest to her heirs, executors, administrators, and assigns. It is not the case of an equitable or trust estate for life, with a use executed to the heir on the death of the tenant for life; but the case in which trustees have a duty to perform after, as well as before, the death of the tenant for life, so clear and defined, neither requiring nor admitting any modification. There would, on the death of the tenant for life, be nothing for this Court to do, but to direct the conveyance or assignment to the heirs, executors, admi-

nistrators, or assigns. And I think, upon the construction of this part of the will, independent of the contingent executory gift over, there is an equitable estate for life, with an equitable remainder to the heirs, executors, administrators and assigns; and that, under these circumstances, Mrs. Noble has an absolute estate subject to be defeated by the executory gift over. And if this be so, the question is, whether the particular event, on which the vested estate is to be divested, can now happen? Having regard to the intention of the testator, and the words in which the gift over is expressed, I am of opinion that the gift over was to take effect only in the event of Mrs. Noble marrying, and dying without issue in the lifetime of her brother, and of such child or children as he might happen to have; and that, as he died in her lifetime, and had no child, I think the contingent executory gift over cannot now take effect, and that the estate already vested in Mrs. Noble cannot now be divested.

With respect to the copyholds, although the testator gave these to the trustees, he has omitted to declare any trust of them. After the description of the subject of his devise and bequest to the trustees, no further mention is made of the copyholds. In the habendum to the trustees, he speaks only of the freehold and leasehold estate; and in the direction to convey and assign to the heirs and executors of Mrs. Noble, and also in the power given to her to grant leases, confines himself solely to the freehold and leasehold estates; and under these circumstances, I think I cannot consider the copyhold as comprised in the trust (1). The testator, G. W. Russen, however, under whom the plaintiffs claim, has only disposed of the copyhold after the decease of Mrs. Noble, his customary heir; but, subject to the right which descended on her as customary heir, the plaintiffs appear to me to be entitled to the copyhold. The decision of the first point appears to me to dispose of the question as to the 1,000*l.* 3*l.* per cent. reduced annuities; they appear to me under the circumstances to belong absolutely to Mrs. Noble.

(1) See *Stubbs v. Sargon*, ante, p. 95.

L.C.
 Nov. 25;
 Dec. 2, 1837. } RAXWORTHY v. RAX-
 Jan. 31; } WORTHY.
 March 28,
 1838.

Pauper—Practice.

A pauper, plaintiff, was shewn to be in possession of 50l. a year; but he swore that he was not worth 5l. after his just debts were paid. The Court, thereupon, ordered him to specify the debts, which specification being unsatisfactory, he was dispaupered.

The plaintiff, in October 1837, had obtained, at the Rolls, an order to sue *in forma pauperis* upon the usual affidavit, "that he was not worth 5l., his wearing apparel and the subject-matter of the suit excepted." A motion was now made on the part of the defendant to discharge that order. The application was supported by the affidavit of the defendant, shewing that a testator, in 1832, had devised certain real estates, in trust, to pay thereout to the plaintiff an annuity of 50l. for life, which he declared should not be disposed of by anticipation. The affidavit afterwards stated, "that the said annuity or annual sum of 50l. given and bequeathed, in trust, for the said plaintiff, John Raxworthy, had been regularly paid to him; and that the last half-yearly payment thereof was made to him on the 29th day of September last."

Mr. Puller for the motion.—The plaintiff supposes, that he cannot sell, or raise money upon the annuity, because the will contains a clause prohibiting him from alienating or charging his annuity; but as there is no gift over, the restriction is, of course, nugatory. The plaintiff cannot be allowed to proceed *in forma pauperis*, while he, in fact, possesses considerable property.

The plaintiff, in person, in opposition to the motion, relied upon his affidavit, which, he said, he was ready to repeat. He said that the moment he received any payment on account of his annuity, it was all swallowed up by his creditors, and he had endeavoured to dispose of his annuity, but without success.

[The LORD CHANCELLOR. — I do not know how I am to disbelieve his affidavit, which is positive. You shew to me that

he has 50l. a year; but that does not prove that he is worth 5l. in the world, if all his debts were paid. The rule as to suing *in forma pauperis* only requires the oath of the party applying so to sue, and does not oblige him to prove the truth of what he swears.]

Mr. Puller, in reply.—It is impossible for the defendant to prove that the plaintiff's debts do not exceed the value of his property; but he shews, that the plaintiff has considerable property, and it is for the plaintiff to specify what are the debts or charges to which it is liable. Suppose it were proved that the plaintiff had 100,000l., is he to be permitted to sue *in forma pauperis* merely upon the common affidavit? He cited *Spencer v. Bryant* (1).

The LORD CHANCELLOR, on the 2nd of December, made the order, but before it was drawn up, the plaintiff moved to discharge it upon an affidavit, in which he stated, "that he had been informed, and verily believed, that, if he had power to dispose of the annuity of 50l. a year for his life, it would not produce sufficient money to pay his just debts, and that he was not worth 5l. in all the world after his just debts had been paid."

Mr. Puller, *contra*.

The LORD CHANCELLOR ordered the motion to stand over until the next seal, with liberty for the plaintiff to file an affidavit, setting forth the amount of his debts and the names of his creditors.

March 28th.—The plaintiff, having filed an affidavit, setting forth the names of several persons, with considerable sums of money set opposite to their names as debts owing by him, renewed his motion to discharge the order of the 2nd of December, and cited *Anon.* (2)

Mr. Puller, *contra*, read affidavits from four of the creditors named in the plaintiff's affidavit, in which they swore, that the plaintiff did not owe them anything; and also affidavits from persons who had applied to other creditors, and had been informed by them, that the plaintiff was not indebted to them in any amount. It appeared from the affidavits, that the plaintiff,

(1) 11 Ves. 49.

(2) 1 Salk. 507.

in 1826, had entered into a composition with his creditors, to pay them 12s. in the pound, and that they had released him from any further claim.

The plaintiff, in reply, said, that, although he had entered into a composition, the debts were honestly due, and he intended to pay them in full.

The LORD CHANCELLOR discharged the order of the Master of the Rolls, enabling the plaintiff to sue *in forma pauperis*.

L.C. { *In re* WARD, AND *in re* THE
March 31. { SUITORS OF THE HIGH COURT
OF CHANCERY.

3 & 4 Will. 4. c. 84—Construction—
Office—Master's Clerk.

The Masters in ordinary in Chancery have power to appoint and dismiss their clerks at pleasure, notwithstanding the act 3 & 4 Will. 4. c. 84. provides salaries for those clerks out of a public fund, mentions them as officers of the Court, assigns to them duties of a responsible nature, and affixes penalties for their misconduct.

In March 1831, Richard Comfort Ward was appointed junior clerk to Mr. Roupell, then one of the Masters in ordinary of the Court of Chancery. In the month of January, in the present year, Mr. Roupell died, and Mr. Lynch was appointed his successor; and shortly after his appointment, he signified to Mr. Ward, but without alleging any misconduct or other cause of dismissal, that he had appointed another person to succeed him in his office of junior clerk. Mr. Ward, thereupon, presented a petition to the Lord Chancellor, stating various clauses of the act 3 & 4 Will. 4, intituled, 'An Act for the regulation of the proceedings and practice of the High Court of Chancery in England,' and, amongst others, the 18th, 20th, 21st, 22nd, 26th, 33rd, and 37th sections.

By the 18th section it was enacted, that no person should be appointed to be chief clerk of any Master in ordinary, unless he should have been a solicitor or attorney for not less than five years, or should have been a junior clerk of one of the said Masters for a term of ten years.

The 20th section enacts, that the Masters, registrars, and their clerks, masters of reports and entries, clerks of affidavits and examiners, shall hold their offices during good behaviour, &c.; but, in this section, the Master's clerks are not mentioned (1).

By the 21st section it was enacted, that the several offices of the High Court of Chancery should be open for the dispatch of business during such hours in the day, and that the *officers and clerks* belonging thereto respectively should attend in such offices in the discharge of their several duties during such times, and for such number of hours in each day, as the Lord Chancellor, together with the Master of the Rolls and Vice Chancellor, or one of them, should, by any order or orders issued by them from time to time, direct.

By the 22nd section, the Lord Chancellor, with the advice of the Master of the Rolls and Vice Chancellor, was empowered to make general orders for carrying the provisions of the act into execution.

By the 26th section, no solicitor or attorney can accept any office, by virtue of the said act, without being struck off the roll.

The 33rd section provides for the payment of salaries to the several officers named in the schedule to the act, out of "the Suitors' Fee Fund Account;" and in the schedule the salaries of the Master's clerks are as follows:—"To the chief clerk of each of the Masters in ordinary, other than the Accountant General, 1,000*l.* To the junior clerk of each of such Masters, 150*l.*" And provision is made for the apportionment of salaries, "in the event of the death, resignation, or removal of the Masters in ordinary, or their clerks, or of any officer,

(1) In the bill, as first introduced, the section corresponding to the 20th in the act was as follows:—"And be it further enacted, that each and every of the several officers and clerks in the several offices of the High Court of Chancery, and their successors, other than and except the clerks employed by such officers as writing or copying clerks, or others, or otherwise, shall hold their said offices during their good behaviour, and so long as they shall personally give their attendance upon their respective duties, and shall conduct themselves honestly and faithfully in the due execution of the duties of the said offices respectively." The clause was, however, varied in the committee, and restricted as in the 20th section.

to be appointed or continued by virtue of this act."

The act also empowers the Lord Chancellor to fix a table of fees to be taken by the Masters and their clerks and other officers of the Court, and all such fees shall be paid once a month, upon affidavit by the person receiving them, to "the Suitors' Fee Fund Account."

The petition then stated an order made by the Lord Chancellor, dated March 4th, 1834, upon the petition of the Masters and other officers, named in the schedule to the said act, (including the petitioner,) whereby it was ordered, that out of the cash, which might from time to time be standing to the account, "the Suitors' Fee Fund Account," there should be paid to the several officers therein mentioned (including the petitioner) the yearly amount of salary respectively fixed for them by the act.

The petition further stated, that, since the passing of the said act, the petitioner alone, as junior clerk, had received and paid to the Fee Fund Account the sum of 5,617*l.* 16*s.* 6*d.*; and it prayed, that so much of the order of the 4th of March 1834, as directed payment to the petitioner of the said salary of 150*l.*, might be continued and confirmed; and that his Lordship would be pleased to declare, that the petitioner was entitled, under the said act, to hold his office of junior clerk, and that he could not be removed therefrom, except by his Lordship's order for misconduct.

Sir Charles Wetherell and *Mr. Wray*, in support of the petition.—The office of Master's clerk, both as to the senior and junior, is in fact a new creation by this act, although by an old name. Before the passing of this act, whatever might have been their duties in practice, they were private servants of the Master, and not recognized by the legislature or by the Court. By this act, the Master's clerks are expressly called "officers of the court," salaries are provided for them out of a public fund, and duties of trust and great responsibility are assigned to them, and their personal attendance is required during such hours as the Lord Chancellor shall think fit. The right of appointment to a new office, created by act of parliament, would *prima facie* belong to the Crown. In this case the head of the

Court ought to appoint its own officer. It must be recollected, that, if the Master has the power arbitrarily to dismiss the junior clerk, he must have the same power with respect to the senior clerk, whose salary is 1,000*l.* a year, and whose duties are considered so important by the act, that a qualification is required, as some security that the person to perform them shall be at least a man of experience. The petitioner has diligently laboured for seven years in his humble but responsible vocation; but three more years are required to bring him within one of the two privileged classes, made eligible by the act for the office of senior clerk. If the power claimed by the Master were to be frequently exercised, it would be a frightful evil as regards the suitors of this Court; and it is impossible to believe, that the framers of this act could have contemplated the existence of such a power. No ability, however great, can compensate for the want of that familiarity with the practice in the Master's office, which can only be acquired by long experience. The act professes to be passed, "that the costs and expenses of proceedings in the said Court should be diminished, and that increased facilities should be offered for the disposal of business therein." By the construction contended for on behalf of the petitioner, the Court will protect the suitor from the delay and expenses to which he must necessarily be liable, if the intricate and important duties performed by the Master's clerk are to be transferred, at pleasure, to those who have yet to learn them.

Mr. Campbell, *contra*, was not called on by the Court.

THE LORD CHANCELLOR.—The sole question is, whether the petitioner has a freehold in his office. Before the passing of this act he was clearly removable at pleasure, and I cannot find anything in this act to give him a freehold. Nothing can be deduced for this purpose from the 18th section, which merely directs, that certain specified classes of persons only shall be eligible to the office of senior clerk, but affords no inference as to the right of any person to be a member of one of those classes. A midshipman cannot be made a lieutenant until he has served six years;

but no one would say, that he has a freehold in his office as midshipman. The 33rd section certainly calls the petitioner an officer; but I cannot construe that expression to alter the tenure of his office, and confer upon him a freehold. The 41st section also includes him as an officer, but only for the purpose of punishment. The main object of the act as to the Masters' clerks, was simply to provide means of payment for them, in consequence of the act depriving the Masters in Chancery of those fees which formed the means of paying their clerks. But the construction of the act is concluded by the 20th sect., which, by enumerating those officers who are to be irremovable, excludes those who are omitted. The 22nd sect. gives power to the Court to carry the regulations of the act into execution; but that section falls to the ground upon this petition, because no general order has ever been made respecting the office of Master's clerk, and it would be very difficult to say how any such order could have been made. I must observe, that, in my opinion, however important it may be, that the higher judicial officers in this country should be independent, yet that the principle does not apply to those in subordinate situations.

Petition dismissed.

M.R.
Feb. 12, 1836. } BORRELL v. HAIGH.
Mar. 16, 19, 1838. }

Will—Devise—Copyhold—Construction.

A will contained a general devise of all the testatrix's messuages, hereditaments, &c., at Holton-le-Clay, and a subsequent devise of all her copyholds at X, Y, and elsewhere. The testatrix had no other copyholds except at X, Y, and at Holton-le-Clay. The Master of the Rolls was, under the circumstances, of opinion, that the copyhold at Holton-le-Clay passed by the first devise, but directed a case to be sent for the opinion of the Court of Common Pleas.

Elizabeth Borrell, the testatrix, by her will, duly executed, and dated the 6th of November 1823, after bequeathing certain sums of money in favour of her

relatives, proceeded to dispose of her real estates; and first, "she gave and devised all her messuages, cottages, buildings, closes, pieces or parcels of lands, hereditaments, and real estate, situate at Brigsley, in the county of Lincoln, unto Theophilus Harneis and John Loft, their heirs and assigns, to the use of William Loft and Thomas Chatterton, for the term of 500 years," upon certain trusts, with remainder to the use of her great-nephew, Richard Borrell, and his assigns for life, without impeachment of waste, with remainder to trustees to preserve contingent remainders, with remainder to the use of the first and other sons of the said Richard Borrell, severally and successively in tail male, with remainder to the use of the first and other daughters of the said Richard Borrell, severally and successively in tail male, with remainder to the uses thereafter declared and hereinafter set forth; and after declaring certain trusts of the said term, for raising portions for the younger children of the said Richard Borrell, the said testatrix gave and devised unto the said Theophilus Harneis and John Loft, their heirs and assigns, "all her messuages, cottages, closes, lands, and hereditaments, situate at *Holton-le-Clay*, in the said county of Lincoln, upon trust to receive the rents, issues, and profits, as and when the same should become due and payable, for and during the term of the natural life of her nephew, (the plaintiff,) John Borrell," upon trust for him for life; and from and after the decease of the plaintiff, John Borrell, the said testatrix directed, that the said Theophilus Harneis and John Loft, their heirs and assigns, should stand seised and possessed of the said estate and hereditaments at *Holton-le-Clay* aforesaid, to and for the several uses, intents, and purposes thereafter expressed and declared of and concerning the same; and the said testatrix gave and devised unto the said Theophilus Harneis and John Loft, their heirs and assigns, all that her messuage or dwelling-house, called Grainsby House aforesaid, with the coach-house, stables, and buildings thereto, and also all her freehold manors, messuages, cottages, farms, lands, hereditaments and real estate, situate in the said several parishes of Grainsby Waith, Tetney Irby, and

Grainthorpe, in the county of Lincoln, and all other her freehold messuages, lands, hereditaments, and real estate whatsoever and wheresoever, not thereinbefore by her devised, to hold the same unto the said Theophilus Harneis and John Loft, their heirs and assigns, to the use of trustees, for the term of 1000 years, to be computed from the day of her decease, without impeachment of waste, upon the trusts thereinafter declared of and concerning the same; and the said testatrix thereby declared and directed, that the said Theophilus Harneis and John Loft, their heirs and assigns, should stand seised of all her said last-mentioned freehold estate and hereditaments, from and immediately after the expiration or other determination of the said term of 1000 years, and subject thereto; and also of and in her said messuages, closes, lands, and hereditaments, situate at *Holton-le-Clay* aforesaid, from and after the decease of her said nephew, the plaintiff, John Borrell; and also of and in the said messuages, cottages, lands, hereditaments, and real estate, situate at Brigsley, in the event of the said Richard Borrell dying without issue of his body lawfully begotten, but subject nevertheless and without prejudice to the several uses and estates thereinbefore devised and limited, and to the powers relating or collateral to such uses or estates, of and concerning the said estate at Brigsley, if any of such uses, estates, or powers, should be then subsisting or capable of taking effect, to the use of her great-niece, Elizabeth Charlotte Borrell, daughter of her late nephew Benjamin Borrell, and her assigns, during the term of her natural life, without impeachment of or for any manner of waste, with remainder to trustees to preserve contingent remainders, with remainder to her first and other sons in tail male, with divers remainders over; and the said testatrix thereby gave and devised all her *copyhold* or customary messuages, lands, tenements, and hereditaments, situate at Tetney aforesaid, and at North Thoresby, in the county of Lincoln, and *elsewhere*, to and for such and the same uses, intents, and purposes, and under and subject to the same charges, limitations, powers, clauses, and conditions, as were by her will limited, expressed, declared, and contained, of and

concerning the freehold estates at Grainaby Waith, Tetney Irby, and Grainthorpe aforesaid, save and except the several limitations thereinbefore contained, to the use of the said Theophilus Harneis and John Loft, and their heirs, during the lives of the respective tenants for life, upon trust to support contingent remainders, and, save and except the limitation to the said William Loft and Thomas Chatterton, for the term of 1000 years; but, nevertheless, so that the several charges should not be increased or multiplied.

The testatrix afterwards authorized Harneis and Loft to allow and expend out of the rents of the said estates at Grainaby Waith, Tetney Irby, Grainthorpe, and North Thoresby, a reasonable sum for maintenance and allowance to the said Elizabeth Charlotte Borrell; and she thereby declared, that the said Theophilus Harneis and John Loft, and the survivor of them, should, until the said Elizabeth Charlotte Borrell attained the age of twenty-five years, or be married with their consent, have, receive, and take the rents, issues, and profits of her said estates at Grainaby Waith, Tetney Irby, Grainthorpe, and North Thoresby, and should stand possessed thereof, upon trust, after paying and discharging all the expenses attending the maintenance and allowance to the said Elizabeth Charlotte Borrell, to pay and discharge, as and when they should severally become due and payable, the said legacies thereinbefore by her bequeathed, amounting to 17,000*l.*, charged on the said estates, out of which the said rents and profits arose; and to accumulate the residue until the said Elizabeth Charlotte Borrell should attain the age of twenty-five years, or until she should marry. And she directed her said trustees to pay, assign, and transfer the said interest, dividends, annual produce, stocks, funds and securities, and the resulting income and produce thereof respectively, and the accumulations thereof respectively, unto the said Elizabeth Charlotte Borrell, on the day of her attaining her said age of twenty-five years, or on the day of her marriage, which should first happen, provided that such marriage should be with the consent of the said Theophilus Harneis and John Loft.

The plaintiff was the heir-at-law and

customary heir of the testatrix. At her death, in 1826, and at the time of making her will, the testatrix had both freeholds and copyholds in Holton-le-Clay, which were intermixed and blended together. The plaintiff claimed a life interest in the copyhold in Holton-le-Clay, under the first devise.

At the first hearing of the cause, on the 12th of February 1836, it was alleged, on behalf of the plaintiff, that the testatrix had other copyholds besides those in Holton-le-Clay, Tetney Irby, and North Thoresby; and an inquiry as to that point, before the Master, was in consequence directed; but the Master, by his report, found that the testatrix had no copyholds except in those places; and that she had about forty-one acres in Tetney Irby, one acre in North Thoresby, and eighty-eight in Holton-le-Clay.

Mr. Pemberton and Mr. K. Parker, for the plaintiffs.

Mr. Barber, Mr. Hodgson, and Mr. Stinton, for the defendants.

Chester v. Chester, 3 P. Wms. 56.

Mostyn v. Champneys, 1 Bing. N.C. 350; s. c. 4 Law J. Rep. (N.S.) C.P. 55.

Doe v. Ludlam, 7 Bing. 275; s. c. 9 Law J. Rep. C.P. 74.

Chandos v. Freeman, Cowp. 363.

Atkyns v. Atkyns, Cowp. 808.

Chapman v. Hart, 1 Ves. sen. 270.

Doe v. Bird, 11 East, 49.

Doe v. Stenlake, 12 East, 515.

Sherratt v. Bentley, 2 Myl. & K. 149—were cited.

The MASTER OF THE ROLLS said he would look over the will, but his impression was, that the copyholds passed by the first devise.

MARCH 19.—The MASTER OF THE ROLLS stated the terms of the will, concluding with the devise of the copyholds, and said—Now this being a devise of all her copyhold and customary messuages, lands, tenements, and hereditaments "situate at Tetney aforesaid, and at North Thoresby, in the county of Lincoln, and elsewhere," it is said to be precisely the same as if it had been "all my copyhold or customary messuages, land, tenements, and hereditaments situate at Tetney aforesaid, and at

North Thoresby, in the county of Lincoln and Holton-le-Clay." And that if the words "Holton-le-Clay" had been inserted instead of the word "elsewhere,"—it being ascertained in point of fact, that she had none elsewhere, than at Tetney and North Thoresby, except only at Holton-le-Clay—this would clearly have been a devise which would have carried the copyholds at Holton-le-Clay, whatever might have been the inference to be deduced from the general words, which were used in the first devise; and if that be so, then Mrs. Haigh would be entitled under the devise which is contained in this will.

Now, undoubtedly, the word "elsewhere" has a very great and powerful effect in wills of this sort. The expression of "a drag-net" has been applied to it; and the expression is such, that it would take in all copyholds, whether they were, or were not, in the contemplation of the testator at the time, or whether the testator knew he had copyholds at any other place. I think the cases are strong to make out, that if there be nothing else in the will, the word "elsewhere" would carry all estates which belonged to the testator elsewhere, though they were not in the contemplation of the testator at the time, and probably never were the subject of the intention at all. But the word is used as a drag-net to take in all not disposed of in any other manner.

That being so, then comes this question, whether that vague and general expression having, as it is said, the effect of a drag-net, to bring in everything which was not specifically in the contemplation of the testator at the time, and not specifically the subject of intention,—whether a vague and general expression having that effect, is also to have the effect of defeating an intention which is to be collected from other words contained in the same will. Now, I consider it to be a rule clearly established, that if there be two inconsistent devises in a will, that that which is contained in the will last, is that which will prevail, provided there be nothing else to vary that effect. But is it so certain that a mere general word of this sort is to defeat that which is the subject of more clear and definite intention in a former part of the will? I really think that this case comes to resolve itself into that single question; and my

opinion is certainly, that which was my impression when I first heard this cause, that the general word "elsewhere" is not sufficient to defeat the effect of those words, which are contained in the prior devise. I think that the previous devise, as it stands, is sufficient to carry the copyholds which were in Holton-le-Clay, and that this general vague expression, however potent it would be to carry things which were not in the contemplation of the testator, and not the subject of specific contemplation at the time when the will was made, is not, as it appears to me, powerful enough to defeat the effect of that intention which does appear by the words which are used in the former part of the will. And when I look to the other parts of this will, I confess I think there are found in it, expressions which seem to confirm that conclusion: for what occurs in the subsequent part, where provision is made for the maintenance and education of this devisee, by means of those estates of which she was to have the use immediately after the death of the testatrix's death? There I find certainly Holton-le-Clay is not referred to, which, I think, it would have been, if the copyholds in Holton-le-Clay had been intended not to pass by the first devise to the use of John Borrell for life.

My opinion, therefore, is according to the impression I first had; but I cannot say that this matter is so exceedingly clear, as to make it unfit, if the parties desire it, to have a case at law. I understand from counsel, that the parties are desirous to have a case, and if so, it is my duty to allow them to have one; it is easy to modify the words of this will so as to put it in a legal form. I think the question would be, whether Mrs. Haigh took an immediate interest in those copyholds at Holton-le-Clay.

M. R. v. NIAS v. THE NORTHERN AND
Jan. 18. { EASTERN RAILWAY COMPANY
AND H. G. WARD.

Practice.—Production of Documents—Solicitor and Client.

This bill was filed in May 1837, and the defendant, by his answer, admitted that he had in his possession a case with counsel's

opinion, dated in December 1836, but which, he stated, "had reference to the matters in question in the cause, and the same was submitted to counsel after the several matters in dispute in this cause had arisen, and bore reference thereto":—Held, that the case was privileged, and that the defendant was not bound to produce it.

This was a motion for the usual production of the documents admitted by the answer of the defendants to be in their possession. The bill, it appeared, had been filed on the 4th of May 1837, for the specific performance of a contract entered into by the defendants on the 13th of May 1836, for the purchase of certain leasehold property. The plaintiff contended, that he was, under the circumstances, bound to make out his title to a limited extent; and that the defendants had waived any further title than that stated and shewn. Amongst other documents stated by the defendants to be in their possession, they stated, they had "a case with Mr. Humphreys's opinion, dated the 12th of December 1836"; and also two other cases, but the production of the latter was not objected to. With reference to these cases, the defendants said, "that such cases, for the opinion of counsel, and the opinions thereon, set forth in the said schedule, had reference to the matters in question in this cause, and the same were submitted to counsel after the several matters in dispute in this cause had arisen, and bore reference thereto; and therefore the defendants submitted the same ought not to be produced." The only point in dispute was, as to the production of the case and opinion of the 12th of December 1836.

Mr. Pemberton, in support of the motion.—The question being, whether there has been an acceptance of the title, it is all important that the case and opinion should be produced, as part of the *res gestæ*. In cases between vendor and purchaser, the opinions of counsel on the title are always communicated to the vendor, and are not considered as confidential. As far as regards the case itself, independently of the opinion of counsel, *Radcliffe v. Fursman* (1), which was decided on appeal by the House of Lords, shews that the plaintiff is

(1) 3 Bro. P.C. 538.

entitled to a production of it—*Preston v. Carr* (2), *Vent v. Pacey* (3).

Mr. Tinney and *Mr. James Parker* requested the production of the case and opinion, contending, that the statement of counsel for his opinion, was as much confidential as a statement made to, or a consultation with, a solicitor. In *Knight v. the Marquis of Waterford* (4), Lord Abinger says, he recommended the appeal in *Bolton v. the Corporation of Liverpool* (5). After an investigation of the authorities, his Lordship says, "I do not think it material whether such communications relate to a cause now in progress, or to matters which took place on former occasions." And in his judgment, p. 40, he says, "As to the decision of Lord Brougham and of the Vice Chancellor, I should say, that the statement for counsel which they ordered to be produced was as much protected as that which they refused;" and in p. 41, "The cases have been pushed to a length which the circumstances upon which they were decided will not justify." That *Radcliffe v. Fursman* had been always disapproved of; and the decision depended on the special circumstances of the case, and did not go the length of deciding that a disclosure must be made of cases laid before counsel "after the matters in dispute had arisen." *Bolton v. the Corporation of Liverpool* was an express authority against the right of the plaintiff. There, Lord Brougham says, "It seems plain that the course of justice must stop, if such a right exists. No man will dare to consult a professional adviser with a view to his defence, or to the enforcement of his rights. The very case which he lays before his counsel to advise upon the evidence, may, and often does, contain the whole of his evidence, and may be, and frequently is, the brief with which that or some other counsel conducts his case." They also cited *Hughes v. Biddulph* (6), and *Wildman v. Logan*, decided by Lord Eldon (MS.)

Mr. Pemberton, in reply.—If the case of *Bolton v. the Corporation of Liverpool* went too far, it was in the restriction of the right of production authorized by the pre-

(2) 1 You. & Jer. 175.

(3) 4 Russ. 193.

(4) 2 You. & Coll. 52.

(5) 3 Sim. 467; s. c. 1 M. & K. 88; 1 Law J.

Rep. (N.S.) Chanc. 166.

(6) 4 Russ. 190.

vious decisions. This case, however, differs from that. The defendants were content with the plaintiff's title, until they changed the line of railroad, and no longer wanted the plaintiff's houses: then it was that they raised difficulties which they had previously waived. The case and opinion are most important, as they form part of the transaction which is in issue in the cause.

THE MASTER OF THE ROLLS.—If this case were *res integra*, and not subject to previous authorities, I should have had no doubt whatever. But the case of *Bolton v. the Corporation of Liverpool*, having regard to the decision, and having regard to the principle laid down as the foundation of that decision, does not appear to me to be, in a satisfactory way, distinguishable from the present; and therefore, whatever my own opinion may be, I think I am bound to give effect to that decision. I confess, as I have stated before, that I cannot concur altogether with the reasoning on which the decision in that case is founded, or with the reasoning of those learned and eminent Judges who have thought that that case went too far in granting the discovery given by this Court (7). On the contrary, I have had occasion to say, that that case did restrict the discovery in a way scarcely justified by former cases; and as to the reasoning, I am yet to learn, that the complete disclosure of the truth, whether it be the disclosure of the truth through communication between solicitor and client, or, if it were possible to effect it, by opening the heart of the party, could, in any way, be prejudicial to the progress of justice, and to that which the Judge must always have in view—doing complete justice between the parties, according to the real facts of the case. I have yet to learn some satisfactory reason for proving, that justice is or can ever be promoted, by concealing the truth in any way whatever; and, if this were a case now to be decided for the first time, I should think it fit to make an order for the production. But I consider myself bound by authority; and, so considering myself, I abstain from making an order.

If the case is carried to the Lord Chancellor, he will not be bound by the autho-

(7) See *Storey v. Lennox*, 6 Law J Rep. (N.S.) Chanc. 104.

rities in the way I am; and if his opinion concurs with former decisions, it will settle the rule.

Note.—The decision was affirmed on appeal by the Lord Chancellor, *post*.

L. C. } *In re* ISAAC WOOD, A LUNATIC,
Feb. 24, 27. } and 3 & 4 WILL. 4. c. 74.

Protector of Settlement—Lunatic.

The Lord Chancellor is not the protector of a settlement in a case where a lunatic is tenant in tail, with subsequent remainders over.

Under the will, of the testator, his real estate, at the time of the presentation of the petition, stood limited as follows:—

“Unto his brother Isaac Wood, and the heirs of his body, lawfully to be begotten,” with remainder to his cousin Elizabeth, the wife of John D. Clark, and the heirs of her body, with remainder to right heirs of the testator for ever.

Isaac Wood, the brother and heir-at-law of the testator, had, in the year 1801, been found a lunatic under a commission, and a committee had been appointed of his person and estate.

John D. Clark and Elizabeth his wife presented this petition to the Lord Chancellor, stating the above circumstances, and the 15th, 33rd, 34th, 35th, 41st, 48th, 49th, 50th, and 79th sections of the above statute; and further stating, that Isaac Wood, the lunatic, was of the age of sixty-four years and upwards, and had never been married: that the petitioner, E. Clark, was desirous of barring her estate tail, and resettling the estate to herself in fee simple in remainder expectant, at the decease and failure of issue of Isaac Wood; and praying, “that his Lordship, as the protector of the settlement under the provisions of the said act of parliament, would be pleased to consent to the barring of the aforesaid estate tail in remainder of the petitioner Elizabeth Clark, with the concurrence of her husband and the remainder-men, and limiting the estate to the petitioner, Elizabeth Clark, in fee.

Mr. Wigram and Mr. Younge, in support of the petition, stated, that the petitioner was the only relation of the lunatic, who

had been a lunatic thirty-seven years; and they submitted, that the lunatic, having an estate greater than an estate for years determinable on the dropping of a life, was protector of the settlement as regarded the estate tail of the petitioners, and that it would be a proper exercise of the discretion of the Court, under the 33rd and 48th sections, to accede to the prayer of the petition.

The LORD CHANCELLOR observed, that it was difficult to see how it could be for the benefit of the lunatic to bar his remainder. This application was made simply for the purpose of serving another person; that the only case in which an order had been made under the act, was by Lord Brougham, and was for the purpose of providing for the son of the lunatic; that the Court, in all cases, was desirous of not interfering with the rights of succession, but the object of this application was to take away the interest of the person who would be heir. His Lordship said, he would, however, consider the case.

Feb. 27.—The LORD CHANCELLOR said, that the lunatic being tenant in tail, the case was not within the act, and that it had been so decided by Lord Brougham and Lord Lyndhurst in *Blewett's case*; and even if his Lordship had the discretion, he would not be justified in dealing with the property in the manner proposed. The lunatic had the largest estate, in fact the whole interest, except the intermediate estate of the petitioner; and even if his Lordship had the power, he would not exercise it in this case.

Note.—See *Grant v. Yee*, 3 Myl. & K. 245; *Re Blewett*, 3 Myl. & K. 250; *Re Newman*, 2 Myl. & Cr. 112.

L. C. }
Mar. 23. } *HEAP v. HAWORTH.*

Practice.—Costs of the Day.

Where a bill is defective for want of parties, and is ordered to stand over, a defendant is not entitled to the costs of the day, unless he raises the objection by his answer, although the defect is apparent on the face of the bill, and the Court itself would not have made any decree without those parties.

On this cause being called on—

Mr. Wigram, for the defendant, objected, that some necessary parties were wanting, and that no effectual decree could now be taken. The objection was not taken by the answer; but as it was apparent on the face of the bill, that there was a defect of parties, he asked for the costs of the day.

The LORD CHANCELLOR.—The rule is, that if a defendant takes an objection for want of parties, without having raised it by his answer, he is not entitled to the costs of appearing, although, from what appears on the bill, the Court itself would very probably make the objection.

Mr. Wakefield and *Mr. G. Richards* were counsel for the plaintiff.

Note.—See *Wilson v. Broughton*, ante, p. 120.

L.C. }
Mar. 23. } MASON v. HEYWOOD.

Power—Execution—Attestation.

A power to appoint by deed or will, "signed, sealed, and delivered," is well executed by a will expressed to be "signed, sealed, published, and declared."

This cause came on for further directions, and the minutes were agreed upon.

Mr. Tinney, of counsel for some of the parties, said, he believed it was clear that a will, expressed to be "signed, sealed, published, and declared" in the presence, &c., was a good execution of a power to appoint by deed or will, "signed, sealed, and delivered." If this were not so, a party not before the Court would be entitled in default of appointment.

The LORD CHANCELLOR concurred with *Mr. Tinney*, in thinking that the power was well executed; and a decree was taken upon that assumption (1).

Mr. Wigram, *Mr. Whitmarsh*, and *Mr. Fensell*, appeared for different parties.

(1) See a similar decision in *Curteis v. Kenrick*, 7 Law J. Rep. (N.S.) Exch. 169, a case sent by the Vice Chancellor for the opinion of the Court of Exchequer.

V.C. }
Mar. 26. } HONEYWOOD v. SIMPSON.

Practice.—Notice of Motion.

A notice to move in this court, means before the Lord Chancellor himself.

Mr. Rasch stated, that the registrar had refused to draw up an order in this cause, which had been obtained from his Honour on a former day, on the ground that the notice of motion was to move in this court.

The VICE CHANCELLOR.—The registrar is quite right. *This court* means the Lord Chancellor's.

Mr. Rasch now took an order upon a fresh notice, before his Honour the Vice Chancellor.

V.C. }
Mar. 27. }
L.C. } THORPE v. HUGHES.*
Mar. 28. }

Practice — Injunction — Irish Banking Act.

A bill was filed to restrain proceedings in an action at law, brought by the public officer of an Irish bank, established under the act 6 Geo. 4. c. 42, and to which some of the shareholders were made defendants. The common injunction having issued against such shareholders, for want of appearance, the Court refused to extend it to stay trial against the public officer.

In this case, a bill had been filed by *Thorpe* against *Hughes* and nine other persons, praying an injunction to restrain proceedings in an action at law which had been brought by *Hughes*, as one of the public officers of a partnership called "The Agricultural and Commercial Bank of Ireland," established under the act 6 Geo. 4. c. 42. The object of the action was, to recover from *Thorpe* the amount of some instalments upon certain shares in the said bank, which had been sold to the plaintiff. The plaintiff's bill charged, that he had been induced to purchase the shares by fraudulent misrepresentations of the state

* Ex relations.

of the affairs of the bank ; and that the defendants were shareholders in the said bank, and some of them directors or members of the managing committee of the said bank, and that they were privy to the fraud. All the defendants resided out of the jurisdiction of the Court. The plaintiff obtained an order, that service of subpoenas on the attorney in the action, should be good service on all the defendants to the suit. The defendant Hughes alone appeared to the bill, and referred it for impertinence, which reference was still pending ; and the plaintiff obtained the common injunction against the other nine defendants, but not against Hughes, to restrain them from proceeding in the action.

The plaintiff now moved that the injunction issued against the nine defendants might be extended to stay the trial of the action commenced by the said defendants in the name of the said defendant Hughes.

The plaintiff, by his affidavit filed in support of the motion, stated, that the company was projected by James Dwyer, one of the defendants, and others ; and that several of the defendants were active in getting up the said bank ; and that all of them, with the exception of the defendant Hughes, took upon themselves to act as the directors or managing committee of the said bank ; and that defendant Hughes took upon himself to act as the secretary and public officer of the said bank. The affidavit further stated, that several of the defendants were aware of the fraud which had been practised on the plaintiff.

The defendant Hughes, by his affidavit in opposition to the motion, stated circumstances to shew that the bank had been duly and properly constituted and carried on, pursuant to the terms of the act of parliament ; and that he and another person were duly appointed public officers of the said co-partnership, under the said act. The affidavit then stated, that he had commenced the action as one of such public officers, and had declared for money had and received to the use of the said co-partnership, and denied that the said action had been commenced by the said nine defendants, or any of them, in the name of defendant Hughes, or on their behalf. He further stated that there were upwards of 3,000 shareholders or members of the said co-partner-

ship ; and that several of the said nine defendants were not directors or members of the managing committee of the said partnership ; and that some of them were not even shareholders therein ; and that many of the directors or members of the managing committee of the said partnership were not made parties to the bill.

Mr. Knight Bruce and *Mr. Jacob*, in support of the motion, contended, that gross injustice would be done if this motion were refused ; that the defendants had put forward a nominal defendant, in order to prevent an injunction ; and that the action at law was substantially the action of the other defendants, although Hughes was the nominal plaintiff.

Portarlington v. Graham, 5 Sim. 416 ; s. c. 3 Law J. Rep. (n.s.) Chanc. 154.

Montague v. Hill, 4 Russ. 128.

That Hughes had appeared by the same attorney upon whom service had been directed by the Court to be good service ; and by serving him, the plaintiff had substantially informed the other defendants of the proceedings which had been taken.

Mr. Wakefield and *Mr. S. Sharpe*, contra.—Under this act, the public officer may sue and be sued alone ; but if it be wished to sue any other members of the partnership, all must be made parties. The defendants, against whom the common injunction has issued, are mere strangers to this action, which is brought by the bank.

Mr. Knight Bruce, in reply.

The VICE CHANCELLOR.—I think *Mr. Hughes* comes within the terms of the common injunction as "an agent" ; and in that view, I see no difficulty in making the order. I think *Mr. Hughes* need not have appeared—I treat it as an *ex parte* motion, and grant it ; nothing individually is prayed against *Mr. Hughes*.

Motion granted.

Mr. Wakefield applied for the costs of his client, but they were refused.

L. C. — March 28. — Hughes appealed from the above order, and the Lord Chancellor reversed the decision of his Honour.

V.C.
 Nov. 18, 20, 21, }
 1837. }
 Jan. 12, 1838. } ELLICE V. GOODSON.
 L.C.
 Feb. 23, 24, 28. }

Practice.—Demurrer—Amended Bill.

After a defendant had put in an answer to an original bill, the plaintiff amended it, by striking out some of the parties and adding others, and by the addition of new matter and the omission of some of the original matter, but not altering the general scope of the bill. A general demurrer put in by the same defendant to the whole amended bill, was held to be bad; as it applied to those parts of the bill to which an answer had already been put in.

In this suit, the original bill was filed by the plaintiff, on behalf of himself and all other the specialty creditors of James Law, deceased; and it prayed for the administration of James Law's estate, and asked for accounts of a great variety of transactions which had taken place respecting his estate, relating chiefly to plantations in the West Indies; and also sought to set aside several transactions respecting these estates.

The defendant, Goodson, who was a mortgagee in possession of the West Indian plantations, put in an answer to the original bill, which bill was afterwards amended in June 1837. The amended bill was on behalf of all the creditors generally of James Law; several persons who were joined as parties to the original bill, were struck out, and some fresh parties introduced; but the general scope of the bill was not materially affected by the amendments.

To this amended bill, Goodson put in a general demurrer for want of equity, for want of parties, and for multifariousness: but these questions not being decided by the Lord Chancellor, it does not appear necessary to state the arguments and cases which were cited respecting them.

Mr. Knight Bruce, Mr. Wigram, and Mr. Loftus Wigram, supported the demurrer.

Mr. Jacob and Mr. Heathfield, in support of the bill, insisted, that after the defendant had put in an answer to the original bill, he could not put in a general demur-

rer to the whole bill, because such demurrer must apply to all that part of the bill which had been already answered; and that it ought, therefore, to be overruled.

Atkinson v. Hanway, 1 Cox, 360.

Ritchie v. Aylmer, 15 Ves. 79.

Mr. Knight Bruce, in reply, contended, that where amendments were introduced into a bill, which were of so important a character as the amendments in this case, a defendant was at liberty to demur to the amended bill, although he had answered the original bill; and cited—

Bosanquet v. Marsham, 4 Sim. 573.

Robertson v. Lord Londonderry, 5 Sim. 226; s. c. 3 Law J. Rep. (n.s.) Chanc. 20.

[The VICE CHANCELLOR.—The rule is, that you shall not, after a bill is amended, put in a demurrer, which applies to that part of the bill which you answered, when you put in an answer to the original bill. But in this case, the amendments have been made, not merely by the addition of new matter, but by striking out of the old matter, and by striking out some of the parties to the original record. The Court must consider this as a new record.]

Jan. 12.—The VICE CHANCELLOR.—In this case I have thought it right, before I decided upon the demurrer, to read through the whole of the pleadings myself. The demurrer is for multifariousness and want of parties, and it does appear to me, upon the best consideration that I can give this case, that the bill is clearly multifarious.—[His Honour then referred to numerous statements in the bill, to shew in what respects it was multifarious.]—But it was said, the demurrer cannot now be permitted, because some answer has been put in to a former bill, and this is now a demurrer to the amended bill. I have read the whole of it through, and, as far as I can make it out, that objection is not sustainable on this record; because, as I understand it, there are new matters introduced by the amendment—new matters bearing the character of multifariousness, which were not introduced into the original bill. I should observe, it seems, that there were two orders for amendment, the first of which appears to have been made so soon after the bill

was filed, that the first answer was probably an answer to the bill with the first amendments; but there was a second order for amendment, and under that, as I understand it, there have been considerable introductions of new and multifarious matter. And I observe, too, that certain persons who were defendants to the record as it originally stood, are not defendants on the record as it is amended. Then two observations arise on this: in the first place, I can easily understand, that when a defendant sees certain other persons defendants, he may not think it right, in respect of the circumstance that they are defendants, to make an objection with respect to matter which is multifarious; but when they cease to be defendants, that which before would be an inducement to him not to demur, would be taken away, and he then is at liberty to exercise his free judgment, whether he should demur or not. And, besides, if the effect of the amendment has been to introduce new multifarious matter, though a party might be willing to submit to multifarious matter in a certain form, and does not take the objection, yet when he finds there is a great mass of multifarious matter brought in by means of the amendment, it appears to me, in common justice, he ought not to be barred by his not having taken the objection before, but ought to be at liberty to take the objection to the multifarious matter as it stands on the record after the bill has been amended; and on the best consideration I can give to the subject, I think, the demurrer for multifariousness should be allowed.

From this decision the plaintiff appealed, and the case was argued before the Lord Chancellor on the 23rd and 24th of February, 1838, by the same counsel who argued it before the Vice Chancellor.

Feb. 28.—**THE LORD CHANCELLOR.**—When I looked at these papers last night, I found I had not got the answer, which it may be necessary I should look at; but the principle on which the case ought to be disposed of, appears to me to be so very clear, that I will state now the view I take of it, and if the counsel for the defendant wish it, or think it material, I will postpone the final judgment on the case

till I have an opportunity of looking at the answer.

The case is of a bill containing very long and complicated matters, (as to which, whether multifarious or not, I do not express any opinion,) to which the defendant put in his answer; the plaintiff then amended his bill, and, as far as I have been able to look at all the amendments, I do not find, nor was it indeed so argued at the bar, that the multifarious matter was introduced by the amendments. Whatever objection for multifariousness arises on the face of the bill, is to be found in the original bill, and is not constituted by that which has been introduced by way of amendment. Now, if that be so, I do not apprehend that there is any difference in opinion between what the Vice Chancellor expressed and that which I am now about to express, because, I find the Vice Chancellor's judgment proceeded entirely on the supposition, that the multifarious matter was introduced by amendment—[His Lordship referred to the Vice Chancellor's judgment].—Now, it is on the supposition that the multifarious matter was introduced by the amendments, that the Vice Chancellor's judgment proceeded. The pleadings were not so gone into at the hearing as to raise that proposition; nor do I understand it to be contended on the part of the defendants, that the multifarious matter depends on the new matter introduced by way of amendment. Now, if so, I am not, in the view I take of the case, acting on any principle or any question of law contrary to the view the Vice Chancellor took of it; but I differ from him as to the conclusion to which he came on matters of fact, which is much more satisfactory to me, when it becomes my duty to express an opinion contrary to that which has been expressed by the Judge below. So far as I have been able to look into this record, such is the fact; and I take it for granted, the case would have been put on the ground which the Vice Chancellor took, if the circumstances had enabled the counsel so to represent it to the Court. But it was not so done, and Mr. Knight Bruce put it upon this ground, which was a very correct view—namely, that you must take all the amended bill as the record, and that although the Court looks into the record for

some purposes, it cannot do so for the purpose of seeing what are the amendments and what constitutes the original matter. Now taking it in that view, and assenting as a general proposition, that this is the correct view of it—what have I upon this record? I have a bill, (taking the amended bill as the bill, and constituting therefore the record of the Court,) stating a great variety of matters, to the greater part by far of which, there is an answer; I then have also, (still considering the bill as one record,) a demurrer to the whole, that is to say, as to all that part which is answered I have an answer, and I have a demurrer applicable to the very same parts of the bill. It is quite clear, if that had been all in the original record, and if the bill had been filed originally as it now exists, that this demurrer would have been incapable of being supported. It would have been overruled in all those parts, to which any answer applied. And then, if I am to look at the amended bill as one record, and look at the truth of the answer, and the demurrer so put in to the same record, it is within the ordinary principle, that there is an answer to part of that, which by the demurrer, the defendant says, he is not bound to answer; the answer, therefore, overrules the demurrer.

Now, this sort of question familiarly applies, in this way:—if the bill be amended, and the defendant, in answering the amendments, repeats what he has before said in the answer to the original bill, that is clearly impertinent; because you must take the two answers together, and the two answers together must constitute an answer to the bill as it exists after the amendments. But the defendant cannot justify answering any part which he has answered before; it would be impertinent if he did; it is not that which he is required to do; and it would be repeating it twice over. What he is to do, is to answer the allegations contained in the amendment, and he cannot substantially repeat that which he has said in his former answer; because, to that part of the bill there is an answer, and all he has to do is to complete the record, by making the new answer fill up that which is wanting in the original answer, so as to make the whole an answer to the bill as it stands in the amended shape.

He cannot, therefore, demur to that part which he has before answered; because the whole taken together constitutes the entire answer to the bill.

Now, this appears to me to be so perfectly clear in point of pleading, and applicable with reference to the acknowledged principle, that I am very glad the Vice Chancellor has not expressed any opinion the other way; and, in such a very copious record as this, it is no great wonder that any body reading it should lose his way, and not have a very accurate conception of what the record is. And I perhaps should have fallen into a similar error myself, if I had not had the benefit of watching throughout the argument, to see how far the case was put, on the ground on which the Vice Chancellor puts it in his judgment; and on looking at the bill, I find it is incapable of being so put; and it was, therefore, very properly not put so at the bar. What would be the result, and how the case would be to be dealt with, if the circumstances were such as it was supposed by Lord Eldon, in *Ritchie v. Aylwin*, might arise, it is quite unnecessary for me to express any opinion. It certainly is possible, that that which Lord Eldon refers to might take place, but it is extremely improbable—namely, that after a bill filed and an answer put in to that bill, the plaintiff should so amend his bill, as to state an entirely new case, so that the original bill would be, as he expresses it, *in nubibus*, and the answer would follow the same course, and they would be both as entirely removed out of the way as if they had never existed. And then Lord Eldon says, you cannot take from the defendant the right of using the ordinary mode of defence against a suit new in fact and substance, although introduced under the pretence of amending an old one. One sees the justice of that, and, therefore, one sees the propriety of guarding against the possibility of mischief, by doing what Lord Eldon did, disposing of that, not on an application to take it off the file, because it was a demurrer to the whole bill, although the bill was an amended bill,—but reserving to himself the opportunity of doing what he thought might properly be done on the argument. Lord Eldon never entertained any doubt but that if the case was otherwise—namely, if

the bill as it stood when amended did not make a different case from that which was originally presented, so as to make the answer totally inapplicable to the state of the record, that the answer as it was found on the record to the original bill, would overrule the demurrer if applied to the whole bill. The same opinion was expressed by all the Barons, in *Atkinson v. Hanway*, where the question also arose, whether the mode of dealing with it was to move to take it off the file or not; and although the Barons differed as to whether it ought to be so dealt with, or disposed of on the hearing, they all came to the conclusion, that if it did turn out that the same subject-matter was the subject of the answer, and the subject-matter demurred to, the answer would overrule the demurrer just as much, although they were put in at different times, one to the original bill, and one to the amended bill, as if they had been both put in to the amended bill, considering the amended bill as one record. I therefore had no doubt at the time at which this was first opened, that that must necessarily be the conclusion, if the facts brought the case up to it.

At the same time, in saying this, I have of course proceeded on this ground, namely, that the demurrer is overruled by the answer, and I have not had the answer. I leave it to the counsel to say, whether they wish me to look into the answer to see whether, consistently with this view of the case, I should or not find the answer overruling the demurrer; but from the course the argument took, and the nature of the bill, I conceive it is very probable, that if all this formed one record, it would have appeared that the answer overruled the demurrer. But I should not wish to come to a conclusion on that, without satisfying myself that it is so, by looking at the answer, or by the parties telling me, at the bar, that it would be unnecessary for me to take on myself that trouble.

With respect to the demurrer for want of parties, Mr. Jacob admitted, that that defect was introduced by the amendments; and the demurrer was then overruled without costs, with liberty to the plaintiff to amend; and if he did not amend within three weeks, then with leave to the defendant to file a new demurrer.

V.C. }
Jan. 12. } WARDE v. COOKE.

Vendor and Purchaser—Opening Biddings.

*Where part of an estate had been sold in four lots, at sums amounting together to 710*l.*, the biddings were ordered to be opened, and the lots resold in one lot, an advance being offered of 160*l.* on the whole amount of 710*l.**

In this suit, some estates had been sold in several lots, and four lots had been purchased by one person, at the respective sums of 610*l.*, 60*l.*, 20*l.* and 20*l.*, making together the sum of 710*l.*

Mr. G. Richards now moved to open the biddings, and to have the four lots resold in one lot, upon an advance of 100*l.* on the whole amount of 710*l.*—*Brackfield v. Bradley* (1).

Mr. Knight Bruce and Mr. Campbell, contra.

The VICE CHANCELLOR said, that as this part of the property was to be sold originally in four lots, he should not, unless there was some good reason, alter the mode of sale, and direct it to be sold in one lot; but, that if the party on whose behalf the motion was made, would offer an advance of 40*l.* on each of the four lots, the biddings might then be opened.

On a subsequent day, this offer was accepted, and the order was then made, that the biddings should be opened on an advance of 160*l.* on the whole amount of 710*l.*

V.C. }
Jan. 26. } PENNY v. PRETOR.

Statute 1 Will, 4. c. 47, Construction of.

Under the above-mentioned act, persons who have a life estate or other limited interest in an estate which is ordered to be sold, are empowered to convey the fee, although at the time of their executing the conveyance, they are infants.

In this suit, (which was a creditors' suit,) part of the real estates of the testator in

(1) 1 Sim. & Stu. 23.

the cause, had been ordered to be sold for the payment of the debts. The estates sold had been devised to A. for life, and after his death, to his first and other sons successively in tail male, with remainder to his daughters in tail; and A. having died without leaving any sons, the estates were, at the time at which the sale was effected, vested in the second infant daughters of A, who were born after the death of the testator.

A petition was presented by the plaintiff in the cause, praying that these infants might be ordered by the Court to join in the conveyance to the purchasers, so as to bar their estates tail.

Mr. Chandless appeared in support of the petition.

Mr. Paynter, on behalf of two of the purchasers, submitted whether the Court could, in this case, make the order which was asked for. That under the 11th section of the act 1 Will. 4. c. 47, infants generally might be directed to convey, and under the 12th section, parties who had a partial interest only in settled estates, were enabled to convey the fee, but that neither section adverted to cases where the parties who were first entitled to the estates had partial interests only, and were at the same time infants; that the infants in this case were not named as devisees in the will, but took under the contingent limitation; and that the effect of the 12th section was to prevent the 11th section being applied to cases where the estates belonging to infants were devised in settlement.

The VICE CHANCELLOR.—Suppose the tenant in tail had been adult, there is no doubt that the Court could have directed him to have done that which was equivalent to suffering a recovery or levying a fine. The 11th section speaks of a case where the heir or devisee may be an infant. If the devisee be an infant tenant in tail, the 11th section must apply. The 12th section was not intended to apply to the preceding cases mentioned in the 11th section, but to cases where there was an estate for life or some less estate, with contingent remainders or executory devises: then it enables the person who has the estate in possession to destroy the contingent remainders or executory devises. If the

party in the cause, instead of being an infant devisee in tail, had been an adult devisee in tail, the Court would, without this statute, have ordered the party to suffer a recovery. The 12th section puts an infant devisee in the same position as an adult devisee.

V.C. }
March 19. } BENT V. YOUNG.

Demurrer—Discovery—Foreign Courts.

This Court will not compel a discovery in aid of an inferior court, nor in favour of a court which has itself the power of compelling a discovery.

Every foreign court is considered an inferior court; and, sensible, this Court will not lend itself to compel a discovery in aid or defence of an action in a foreign court.

This case came before the Court on a general demurrer to a bill of discovery in aid of legal proceedings in the Dutch colony of Surinam.

The bill stated, that the plaintiff was owner and in the actual possession of an estate in Surinam in South America, subject to a mortgage for 10,000*l.*, vested in Rickards, M'Intosh, & Co., who were consignees of the produce. That an account current, the balance of which formed the subject of such mortgage, subsisted between the plaintiff and defendant, and had never been settled, the plaintiff contending, that the proceeds had liquidated the whole, or a considerable part of the balance; and, at all events, only a small sum, and far less than the amount claimed to be due by the defendant, was then, and would, upon taking of an account, be found due and owing from the plaintiff upon the said mortgage security, but such accounts were of considerable extent, and of much intricacy and complication; and that by reason of the absence of the documents, and the refusal of information by the parties, and in particular by the defendant, the particulars of such mortgage, and of the deeds or instruments creating the same, could not be further set forth. That Rickards & Co. some time since became insolvent, and an assignment of their estate and effects, including their interest in the said mortgage,

was made and executed by the said firm to certain persons (of whom the defendant was one), as trustees, for the benefit of the creditors of said firm; that the said colony of Surinam belonged to or formed a part of the dominions of the King of Holland, and the laws of Holland prevailed, and were the governing laws of that colony, and the Courts there were entirely subject to, and were in all things governed or regulated by the said laws; that by and according to the law of Holland and of the said colony, the purchaser of any mortgage debts, charge, or incumbrance upon or affecting any plantation, estate, or property, subject to the said laws, and in particular within the said colony of Surinam, could not lawfully or rightfully set up, establish, or make available any greater debt, demand, or sum of money by way of lien, charge, or incumbrance, or otherwise, upon or against such plantations, estates, or property, under or by virtue of such mortgage, charge, or incumbrance than the actual amount or sum of money which such purchaser actually paid upon the purchase of such mortgage, charge, incumbrance, or debt, together with interest thereon, from the time of such payment; and that the owner or proprietor of such plantation, estate, or property, was entitled to redeem or discharge the same of and from such mortgage debt, charge, incumbrance, or debt, upon and by payment of such amount or sum of money so paid, together with interest thereon.

The bill then stated, that the defendant had some time since become the purchaser, and had taken a conveyance of the said mortgage security; that said defendant, as such assignee or purchaser, has lately commenced and instituted a certain suit, and was prosecuting proceedings, or had taken measures, and had given instructions and directions to his agents there to commence and institute a suit or proceedings in the competent court in the colony of Surinam, for the purpose of enforcing and making available the said mortgage debt or charge against the said plantation of the plaintiff; and he thereby claimed to be entitled, and sought to receive and recover from the plaintiff, and to establish and make available by process upon, and to raise and recover out of the said plantation the whole of the said principal sum of 10,000*l.*, to-

gether with a very large arrear of interest thereon, to a very considerable amount, in the whole very greatly exceeding the amount or sum actually paid by him, the fact being, as the plaintiff had lately discovered, that the said defendant bargained and purchased the said mortgage debt or charge, and actually paid, by way of discount, and at an undervalue, a much smaller amount or sum than the amount or sum which he so claimed by his said suit and proceedings to be so due and payable to him, and sought to recover as aforesaid, in breach of the said laws in that behalf, to the benefit of which the plaintiff was advised he was fully entitled, as against the said defendant; and the plaintiff was desirous and intended to take advantage thereof in the said suit and proceedings of the said defendant, and to make out and establish therein or otherwise in the said court, the fact of such purchase, in order to redeem and relieve his said plantation, by paying to the defendant such amount or sum only as he actually paid upon and for his said purchase, together with interest, as by the said laws, and the practice and usage of the said court, it was competent to him to do; but that the plaintiff has not been able to obtain any sufficient evidence whereby to prove and establish the fact of such purchase at an undervalue, and the amount or sum actually and *bond fide* paid by the said defendant for the same, and inasmuch as the defendant has never been resident in that country, the plaintiff had no means of obtaining a personal discovery from the defendant, touching the said matters for the purposes aforesaid, save and except by the aid and interference of a court of equity in this country, to the process of which the defendant was personally amenable, and which discovery plaintiff was advised he was entitled to require and receive from the said defendant.

The bill then contained several other charges as to the defendant's having full notice of the accounts and the disputes relative thereto between the plaintiff and Rickards & Co., and the usual charge as to deeds, books, and papers, and prayed that the defendant might answer the premises, and make a full discovery and disclosure touching the matters aforesaid, and that the defendant might, in the meantime, and until

he should have made and given such discovery and disclosure, be restrained from prosecuting his said suit and proceedings in the said court at Surinam, and from, in any manner, prosecuting or enforcing a claim or demand upon or against the said plantation of the plaintiff for any greater amount or sum than he actually paid upon or for the purchase of the said mortgage debt or charge, together with interest thereon, or otherwise, in such manner as might be deemed requisite, so that the plaintiff might have the full benefit of the said laws of Holland and of the colony, and might be enabled effectually to defend and protect himself in the said suit and proceedings, as to the said claim or demand of the defendant, as far as the same exceeded the amount actually paid by him, together with interest.

To this bill, Sir William Young, the sole defendant, demurred, and for cause of demurrer shewed, "that the plaintiff had not, by his bill, made any such a case as entitled him, in a court of equity, to any discovery from the defendant, touching the matters contained in the said bill, or any or either of such matters."

Mr. Knight Bruce, Mr. Jacob, and Mr. Blunt, for the demurrer.—As a general rule, this Court does not, for the purpose of compelling discovery, aid either inferior courts, or courts that can of themselves compel discovery; neither does it extend its aid to foreign courts, unless fully informed what use will be made of the discovery if given, lest the discovery thus obtained, may furnish such information to those foreign courts, as may enable them to work what, in the eye of this Court, would be an act of gross injustice. This Court, in short, never lends its aid for the purpose of discovery, unless fully apprised of the purposes for which the discovery is asked, and the use to be made of it, when obtained (1). This Court does not know what may be the effect of granting this discovery; possibly, by the laws of Surinam, the effect of this discovery may be to work a forfeiture or confiscation of all the property of the defendant in that colony, as having transgressed the laws of

that country. There is this other general rule, this Court never interferes, where, as in this case, a colonial plantation or immoveable property is the subject-matter in dispute, because there is nothing in the suit on which this Court can fasten, for the purpose of giving effect to its decree. If the plantation was here in the shape of produce or consignments, and both the parties, litigating the right thereto, resident in this country, then we admit that this Court might interfere, as it did in *Talleyrand v. Boulanger* (2). We admit also, that in such a case, the Court would inquire into the law of the colony, the *lex loci rei sitæ*, and that the law of the colony would govern the equitable decision of this Court. If Lord Redesdale had thought that a bill of discovery in aid of proceedings in a foreign court, could be granted by the courts of equity here, he would have stated so in the text of his treatise. But the only authority for the proposition throughout the four editions of that admirable work, is in a note (3), which cites a case of *Crome v. Del Rio and Vallego*.—[The record of that case was handed up to his Honour (4).] The demurrer in this

(2) 3 Ves. 447.

(3) Page 186, 4th edit.

(4) L.C.—18th March 1769.—*CROME v. DEL RIO*.

—This was a bill by a plaintiff of the name of Crome, and several other tradesmen, who were stated to be resident at Norwich and elsewhere, and was to the effect following:—That plaintiffs were in the year 1767 induced by recommendations to enter into terms of trade with a certain person named Juan Calvo de Villalobos, then in England, but who shortly after such negotiation returned to Spain, and in pursuance thereof, they supplied him with goods to the amount in the bill mentioned, and which goods were shipped for him from London to Seville. That plaintiffs had drawn bills on Villalobos, for the amounts of the goods so supplied, which had been dishonoured, and that Villalobos was insolvent. That the defendants Del Rio and Valejo had, by fraudulent means, induced Villalobos to make over to two persons named Rodrigues and Ruiz della Vega, the agents at Seville of the defendants, goods and effects of the plaintiffs so supplied to Villalobos, in discharge of accruing demands of the defendants on Villalobos, although at that time there was nothing due from Villalobos to the defendants. That the effects of Villalobos having been thus unduly made over to Rodrigues and Ruiz della Vega, the plaintiffs had properly instituted a suit at Seville against those persons; but, that they having been examined before a proper magistrate at Seville, had denied that they had any effects in their hands belonging to the defendants, and in proof they produced four letters, by

(1) Mitford on Pleading, pp. 185 to 187, 4th edit., Lord Derby v. the Duke of Athol, there cited.

case was allowed, but the arguments on the hearing, or the grounds of the judgment nowhere exist: inasmuch, however, as the demurrer is clearly what would now be called a speaking demurrer, it is not assuming too much to suppose, that Lord Camden on that ground overruled it. In *Crowe v. Del Rio and Vallego*, the plaintiff had actually instituted a suit at Seville. But this bill does not positively allege that a suit has yet been instituted at Surinam, but merely that the plaintiff "has taken measures, and has given instructions and directions to his agents there to commence and institute a suit or proceedings." This Court will not, therefore, now interfere; for when the action has been actually commenced, *non constat* that the defendant may not be resident at Surinam, and be amenable to the jurisdiction of the courts there.

Angell v. Angell, 1 Sim. & Stu. 83;
s. c. 1 Law J. Rep. Chanc. 8.

Moodalay v. Moreton, 1 Bro. C.C. 469.

Cardale v. Watkins, 5 Mad. 18.

Stewart v. Lord Nugent, 1 Keen, 201;
s. c. 6 Law J. Rep. (n.s.) Ch. 128.

Again, the bill states the plaintiff to be

which the defendants had admitted that Rodrigues and Ruiz della Vega had not in their hands any effects belonging to them, the defendants, but that on the contrary they the defendants were indebted to those two persons.—The bill then stated, that it had therefore become necessary for the plaintiffs to prove that on the 10th of November 1769, Rodrigues and Ruiz della Vega had in their hands money or effects belonging to the defendants. The bill then stated the different matters and accounts which would, if discovered, prove the case for the plaintiffs, and prayed that the defendants Del Rio and Valejo might severally make full and true discovery of all the matters therein stated and charged.—To this bill, the defendants put in a demurrer, which was, that they were advised that the substance of the said bill was to compel a discovery from the defendants of certain accounts, letters, papers, and writings which related to the matter of a certain suit commenced by plaintiffs against Rodrigues and Ruiz della Vega, and still depending in a foreign country, (to wit,) at Seville, in the kingdom of Spain, and out of the jurisdiction of this court, and to which said suit, defendants were no parties, and also, for that plaintiffs' said bill, in case the allegations therein contained were true, which defendants in nowise admitted, did not contain any matter of equity whereon this Court could ground a decree, or give plaintiffs any relief or assistance, as against defendants.—This demurrer was, on the hearing, overruled by Lord Camden.

"in the actual possession" of the plantation in question; he is therefore a resident at Surinam, and *prima facie* must be taken to be a Dutch subject. Will this Court compel discovery against a resident British subject, in favour of an alien, a resident subject of a foreign country? There is no mutuality. In *Crowe v. Del Rio*, all the parties were within the jurisdiction; here, the plaintiff is at Surinam. How is the defendant to enforce, if necessary, an answer to a cross bill?

Mr. Wigram and *Mr. O. Anderson*, in support of the bill.—The plaintiff in this suit is resident in England, but is suing in the courts at Surinam. He is anxious to obtain a discovery here, not in order to deprive the defendant of the money actually and *bona fide* due to him on the security of the mortgage on this plantation, but for the purpose of ascertaining the exact amount really due; to prevent the defendant from recovering the whole of the 10,000*l.* and interest, instead of that which he in fact purchased, namely, the amount really due from the plaintiff to Rickards & Co., on the result of the accounts between them. The plaintiff wishes the defendant to obtain the full benefit of that only which the bill alleges, and the demurrer admits; he intended to purchase, and did in fact purchase. The bill throughout alleges that the plaintiff is desirous, and intends to redeem his plantation, by paying to the defendant the amount which he actually paid for the purchase, together with interest. If, therefore, this bill had been a bill to redeem, alleging the law of Surinam to be as stated and admitted, that law, being foreign law, would have been the subject of an inquiry; but when the inquiry had ascertained the law, the *lex loci rei sitæ* would have governed the decision of this Court, as to the amount to be paid to the defendant by the plaintiff, as the terms of the redemption (5). If, then, the plaintiff had prayed this relief, the Court would have given the discovery as incidental to the relief: why not then give him the discovery, when it is admitted that he intends to redeem in the Courts of Surinam, as soon as he has got the requisite discovery? The only difference to

(5) *Martin v. Nicolls*, 3 Sim. 458.

the defendant is, that he will obtain this advantage, that as soon as he has given the discovery, he will obtain the costs of this suit. In *Crowe v. Del Rio*, the plaintiff in equity was also the plaintiff at law, and must be considered to have elected to proceed at law in the Court of Seville; and yet Lord Camden overruled a demurrer. In this case, the plaintiff is not only plaintiff in equity, but he is the defendant proceeded against at law; he has no election, and comes here to ask discovery in aid of his defence against a party having a similar option of electing, as the plaintiffs in *Crowe v. Del Rio*. By the rules of this Court, a person cannot proceed at the same time both at law and in equity in respect of the same matter; he may be compelled to elect by a motion of course. No such rule applies in the case of a defendant, who, if sued at law, may come into equity, and sift the conscience of the plaintiff at law, and compel him to furnish a discovery which may be a defence to the action at law.

March 19. —The VICE CHANCELLOR [without calling for a reply].—It appears to me, that if the plaintiff in the present bill, really requires that which he insists he is entitled to by virtue of the law of Holland, he might have it at once, by filing a bill for relief, and compelling an account to be taken; and I am quite willing to admit, that the *lex loci rei sitæ* must prevail, if I understand the nature of the subject of dispute stated by the present bill. But it does not follow, because this Court would, in administering relief upon a Dutch Surinam security, follow the law of Holland with respect to that security, that therefore this Court will make itself ancillary for the purpose of compelling a discovery in aid of an action or a suit not yet brought, but which may be brought in the colony of Surinam.

Now, it certainly struck me as a very remarkable thing, that considering the vast number of transactions which must have taken place between the British and foreign Courts, with respect to foreign plantations, no one instance can be produced, except this single case, which is mentioned in my Lord Redesdale's book; and it does strike me as a very remarkable

thing, that if in his opinion that case were settled law, he should not have stated it with greater confidence than he has done in all the different editions of his book.

Now, my Lord Hardwicke certainly, in the case of *The Earl of Derby v. the Duke of Athol* (6), seems to consider it as clear, that this Court, in the first place, will not compel a discovery in aid of an inferior court, neither will it compel a discovery in favour of a court which may itself have the power of compelling that very discovery. These are the two propositions which really appear to me to follow very plainly from the language which he uses at the end of his judgment in that case. And I cannot but think that this Court considers every foreign court as an inferior court. Then, we find only this single authority which is mentioned by my Lord Redesdale; and looking at what is stated in the bill in that case, it appears to me, that without entering into the question of substance, but as a mere matter of form, the demurrer must, as a matter of course, have been overruled, because it does not appear to me that it was sufficient. The two causes of demurrer assigned are, first, that the matter regarded a suit in a foreign country, to which the defendants were stated not to be parties, and the other ground, as I understand it, is general want of equity, whereon the Court could ground a decree or give relief. Well, but the bill was not filed for relief, but for discovery only, and therefore there was no objection to the bill on that ground. The other ground, as I understand it, was, that the defendants averred that they themselves were not parties to the proceedings at law. Now, it appears to me, that this was a speaking demurrer, because there was no such allegation upon the face of the bill. The allegation which the defendants introduced into the demurrer, that they were not parties to the action at law, seems to me to have made it a speaking demurrer, and this demurrer might therefore have well been overruled by the Lord Chancellor, without giving one particle of consideration to the question, whether discovery can be compelled in this court, in order to aid the defence to an action or suit in some foreign court.

(6) 1 Ves. sen. 201.

With respect to the next ground of demurrer to the present bill, it does not appear to me that it is sufficiently averred upon this bill, that there cannot be a discovery compelled in the Court of Surinam, and it appears the most obvious thing which would occur to the Judges of the Court of Surinam, would be, that which constantly occurred to the mind of Sir James Mansfield, and upon which he acted, namely, to say to the plaintiff, "You must answer some questions before the action shall be tried." I have, however, nothing to do with that, but it appears to me that the allegations amount to nothing more than a sort of argumentative statement, that on account of the particular circumstance that Sir William Young has been resident, and is now resident in this country, the plaintiff cannot have a discovery abroad, but *non constat*, when the action is commenced, he may not be in a place where discovery may be compelled. It appears to me, that the reason of my Lord Hardwicke applies to the case here: there are not averments, upon this bill, sufficient to exempt it from the operation of his observation; and I should be extremely sorry myself to be the first Judge to make a precedent, namely, that this Court is in all instances to lend itself to compel the giving of discovery, in order to assist in an action, or in the defence to an action, in a foreign court; and my opinion is, that this demurrer ought to be allowed.

Demurrer allowed.

V. C. { JONES v. ROBERTS.
Jan. 13, 15. { *In re* —.

Solicitor—Agent—Bill of Costs—Taxation.

The Court has jurisdiction to order an agent's bill of costs to be referred for taxation, on the application of the solicitor who employed him; and in a case, where the amount of the bill exceeded the amount of monies received by the agents in that character, and retained by them, by a sum of 1l. 10s. 10d. only, the taxation of the bill was ordered, upon payment or tender of that sum to the solicitor of the agents.

This was a petition presented by the London solicitor of the plaintiffs in this suit, for the purpose of obtaining the taxation of a bill of costs delivered by the country solicitors who had been employed by him as agents in the suit. The country solicitors had received a sum of money, on account of the plaintiffs, out of which they retained 70l., and afterwards, in January 1837, sent in a bill of costs amounting to 73l. 4s. 8d. On the 30th of the same month, the petitioner obtained an order for the taxation of this bill: but, as the order directed the taxation to be made as between solicitor and *client*, instead of being as between solicitor and *agent*, it was, in consequence of this irregularity, discharged with costs, in April following.

Upon the petitioner objecting to some of the charges in this bill, and in the month of February, before notice had been given of the order for taxation, a second bill was delivered, in which some of the charges in the former bill were omitted, and other items and charges were introduced. By this second bill, the amount was reduced to 71l. 10s. 10d., and notice was given to the petitioner, that this was the bill by which the agents intended to abide. This bill was returned by the petitioner to the agent's solicitor in London, at the same time at which notice of the order for taxation was given.

The petitioner stated, that he had tendered to the agents' solicitor in London, a sum of 3l. 4s. 8d., being the difference between the amount of the first bill and the amount retained by the agents; and he offered by his petition to bring this sum into court, if necessary.

Mr. Knight Bruce and Mr. Ayrton, in support of the petition, cited—

Corner v. Hake, 2 Cox, 173.

Binsted v. Barefoot, 1 Dick. 112; s. c.

Beames on Costs, 306 (1).

Beames on Costs, 361.

Ostle v. Christian, Turn. & Russ. 324.

In re Barker, 6 Sim. 476.

Lees v. Nuttall, 2 Myl. & K. 284; s. c.

4 Law J. Rep. (N.S.) Chanc. 124.

(1) The registrar's books were produced in court, in order that the entries respecting this case might be examined. They are referred to in his Honour's judgment.

Mr. Jacob and Mr. Edwards, contra, insisted, that under the statutes of 2 Geo. 2. c. 23, and 12 Geo. 2. c. 13, the Court did not take any authority to tax agents' bills of costs. They cited—

Wildbore v. Bryan, 8 Price, 680.

Beames on Costs, 306, 307.

Paget v. Nicholson, *Beames on Costs*, 361; s. c. 1 Dick. 285.

Weymouth v. Knipe, 3 Bing. N.C. 387.

Dagley v. Kentish, 2 B. & Ad. 411; s. c. 9 Law J. Rep. K.B. 183.

Wilson v. Gutteridge, 3 B. & C. 157; s. c. 2 Law J. Rep. K.B. 221.

Bignol v. Bignol, 11 Ves. 328.

Loveridge v. Botham, 1 Bos. & Pul. 49.

THE VICE CHANCELLOR.—My opinion is, that I am bound by what has taken place in this court, where I find there has been an uniform series of practice. The courts of law will judge for themselves what jurisdiction they have with respect to the matters before them; but I, sitting in this court, am bound by what I find to be a series of decisions in this court as shewn by orders, and adopted by Judges from time to time.

It appears to me unnecessary to consider how the jurisdiction was first assumed by the Court; but the first order, I find, was made by the Master of the Rolls in December 1745; and I cannot but think that there is an error in the minute in the registrar's book which has been produced, of an application which was made to Lord Hardwicke: I cannot but think, attending to the circumstances as to what the original order was, and the names of the parties concerned, that the order made at the Rolls was the subject of the discussion referred to in the book now before me. If that be so, then I have an order made at the Rolls—an attempt made before Lord Hardwicke to discharge it—and no order made. That, I think, is *prima facie* a recognition by Lord Hardwicke, that the order made at the Rolls was right. Then setting aside what appears to have taken place before Lord Thurlow, which certainly seems to be very inaccurately reported by Mr. Cox (2), I have that great Judge, Lord Eldon, stating, in *Ostle v. Christian*, that he con-

curred in the opinion that a solicitor could not obtain the taxation of an agent's bill, *without bringing the amount into court*. It would be frivolous to state this, if his opinion was, that whether the money was brought in or not, the bill could not be taxed. It must be taken, from this passage of Lord Eldon's judgment, that the Court had power, on the application of a solicitor, to order the taxation of the agent's bill; but his opinion goes on to state that the taxation could not be had without bringing the money into court.

Then there is the case of *Lees v. Nuttall*. The judgment of the present Lord Chancellor when Master of the Rolls, is divided into two parts, first, as to how far the Court had jurisdiction on motion to discharge an order made on petition; but the latter part of the judgment appears to me to shew that his Lordship's opinion was, that there was jurisdiction in this Court to order the taxation; because he does not take as the ground for discharging the order which had been made, that there was no such jurisdiction, but he considers the special circumstances of the case, which he assigned as the reason for discharging the previous order. I think, therefore, that I have an opinion which binds my own, namely, the opinion of the present Lord Chancellor, that this Court has jurisdiction to tax an agent's bill on the application of the solicitor.

I can easily understand that this Court in many cases will take on itself a more arbitrary jurisdiction than a court of law would assume, because in many cases this Court sets the example which ought to be followed; and is thereby the means of suggesting to the legislature what ought to be the rule of law. I take, for instance, the doctrine of set-off, and the preventing a landlord from recovering by ejectment, when the only question was the amount of rent due. In these cases, this Court interfered long before there was any statute on the subject; and in cases where justice seems to require that there should be a taxation of a bill, it is very reasonable to suppose that long before either of the statutes of Geo. 2, this Court had jurisdiction to interfere. It does not appear to me that there is anything like an expression in either of those statutes, which

(2) *Corner v. Hake*, 2 Cox, 173.

took away this jurisdiction; for the first gave jurisdiction to be exercised in a particular manner, and the second directed that nothing therein should apply to the case of attorney and agent. When you say that this jurisdiction can be exercised on bringing the amount into court, you take a proceeding which is quite independent of both statutes. So that there is a clear jurisdiction to direct taxation of the bill. But in this case it appears that there was a second bill delivered, in which certain alterations were made; and the second bill was returned at the time when the order for the taxation of the first bill was served, which, as I collect from the date of a letter from the agents, must have taken place on the 3rd of March, or thereabouts. That bill, so returned, does not appear to have been ever re-delivered, but it appears that there were, in the judgment of the agents, some items which ought not to have been introduced, and that there were items omitted which should have been inserted. They ought to have the benefit of that; and the order ought to be so made, as to give the opportunity of having the second bill taxed, which was more just and taxable than that which was first delivered.

An order was then made, that upon payment or tender (without prejudice) to the London solicitor employed by the agents, of 1*l.* 10*s.* 10*d.*, the second bill should be re-delivered, and referred to the Master for taxation.

V.C. }
Jan. 26. } LOWRY v. FULTON.

Practice.—Pleading—Parties.

Two of the residuary legatees of a testator who died in India, filed a bill against the representative of a person who was named in the will as a trustee and executor, but never consented to act, but who was alleged in the bill to have in some manner acted in the trusts. One of the persons named in the will as executors, had proved the will in India, and was a party to the transactions, by which the trust fund was wasted; and another of the persons so named, proved the will in England, but both these parties were

out of the jurisdiction. The bill prayed for a general account of the testator's personal estate, and for the appointment of new trustees:—Held, that the suit could not proceed in the absence of the personal representative of the testator; and that the third residuary legatee or his personal representative, and also the executor who proved in India, were also necessary parties.

This suit was instituted by the two surviving children, and residuary legatees of a testator, for the administration of their father's estate.

The testator lived in India, and made a will and codicil there in 1817, by which the residue of his personal estate was bequeathed to James Lowry, Lieutenant-Col. Casement, and J. W. Fulton, upon trust to invest it in government or other good securities for the benefit of his two sons, George Lowry and John Lowry, and his two daughters, Jane Lowry and Mary Ellen Lowry, in equal shares, the sons to take at twenty-one, and the daughters at twenty-one or marriage, with benefit of survivorship among the children, in case any of them died before their shares became vested.

The testator died in India, in 1819, and his will was shortly afterwards proved at Calcutta by Col. Casement alone, and was proved in this country by James Lowry alone. The testator's property consisted principally of a sum of 141,473 sicca rupees, which was, at the time of his death, in the hands of Messrs. Mackintosh & Co., of Calcutta, in which house Mr. Fulton was a partner, and this sum was allowed to continue in their hands, being transferred in their books to the account of Col. Casement, as executor of the testator; and on the failure of the house of Mackintosh & Co., the trust fund was considerably diminished.

John Lowry died an infant. George Lowry was also dead, having attained twenty-one, and made his will; and letters of administration to his effects, with his will annexed, had been granted out of the Consistory Court of the Bishop of Down and Connor to James Lowry. But the bill alleged that George Lowry had received his share of his father's estate.

Mr. Fulton left Calcutta in 1820, and

died in England in 1830. He had not consented to act as trustee under the will, but he had done several acts connected with the estate, which, as the plaintiff contended, rendered him liable as a trustee. This suit was instituted against Anne Fulton, his executrix, and also against Col. Casement and James Lowry, who were both out of the jurisdiction, the former being in India, and the latter being in Ireland.

The bill asked for a general account and administration of the testator's personal estate; and that the trustees might be declared personally liable in respect of any breaches of trust they had respectively committed; and it also asked for the appointment of new trustees.

Mr. Knight Bruce and *Mr. Lloyd* raised three objections for want of parties; first, that there was no personal representative of the testator before the Court, and that, on this account, the suit could not proceed. *Mr. Fulton* had not taken on himself the execution of the trusts, and could only stand in the position of a debtor to the estate: the question therefore was, whether legatees could file a bill against a debtor to the estate of their testator, without making his personal representative a party.

Fell v. Brown, 2 Bro. C.C. 276.

Browne v. Blount, 2 Russ. & Myl. 83; s. c. 9 Law J. Rep. Chanc. 74.

Roveray v. Grayson, 3 Swanst. 145, n.

Lowe v. Fairlie, 2 Mad. 101.

Humphreys v. Humphreys, 3 P. Wms. 349.

Stratton v. Davidson, 1 Russ. & Myl. 484.

Tanfield v. Irvine, 2 Russ. 149.

Wilson v. Moore, 1 Myl. & K. 126.

Tyler v. Bell, 2 M. & C. 89; s. c. 6

Law J. Rep. (n.s.) Chanc. 169.

Logan v. Fairlie, 2 S. & S. 284; s. c.

3 Law J. Rep. Chanc. 152.

Munch v. Cockerell, 6 Law J. Rep. (n.s.) Chanc. 9.

And see *Lyde v. Hale*, 4 Law J. Rep. (n.s.) Chanc. 180, and *Shaw v. Shore*, 5 Law J. Rep. (n.s.) Chanc. 79.

They also insisted that Casement was a necessary party to the suit; he allowed the trust fund to continue in the hands of Mackintosh & Co., and he was the person who was more particularly bound to account

for that fund. The third objection, for want of parties, was the absence of a personal representative of George Lowry: the bill sought a general account of the testator's estate, and consequently all the residuary legatees, or their representatives, were necessary parties.

Mr. Jacob, *Mr. Wigram*, and *Mr. Coleridge*, for the plaintiffs.—Where a party is named as a defendant, but is out of the jurisdiction, the Court will, if possible, proceed against such of the parties as are present—*Price v. Demhurst* (1). In this suit process is prayed against Casement and James Lowry, when they come within the jurisdiction; and James Lowry is the personal representative both of the testator and George Lowry. In *Logan v. Fairlie*, a personal representative was a necessary party, because legacy duty had to be paid; but here, there is no such occasion.

The VICE CHANCELLOR.—It is not necessary for me to give an opinion on a case which is not before me; but I can conceive that it might be possible so to frame a case with regard to the transaction with which Fulton was concerned, as to have relief against his representative without making some of those persons parties whose presence is said to be necessary on this record. But that is not the case as it stands, and I judge of what this case is, by what appears on the face of the prayer of the bill.

Now, as I understand the case, it was this: the testator made a will, by which he appointed Casement, Lowry, and Fulton executors; Casement proved the will alone in India, and Lowry proved the will alone in England; and it is observable, that this prayer seeks generally for the administration of the personal estate. It appears, that Fulton never proved, but did in some manner act, and it is in respect of his acting, which seems to have been with the concurrence of Casement, that personal relief is sought against his representative by the prayer of this bill. Now, how can I administer the estate generally without having the personal representative of the testator here? Fulton never proved, and though he might, in some sense, be said

(1) 6 Law J. Rep. (n.s.) Chanc. 226.

to be the executor, yet, he having died, the representation of the testator is not in Fulton's executor, because Casement and Lowry are both still living. Casement is said to be now in India, and Lowry in Ireland; but it appears to me, that it is absolutely necessary, for the general administration of this estate, that there must be in this case before the Court, with more or less substance of character, a person who does represent the estate of the testator. And though it may be true, that the person appointed such representative would be merely the nominee of the plaintiffs, yet, though he assumes that character, probably in order to assist the plaintiffs, when he is once appointed he incurs all the responsibility of the administration, and the Court looks to him to see that the estate is properly protected by his superintendence. It seems to me, that the allegation that Casement is in India, and Lowry in Ireland, is no answer to the objection, that there is no personal representative of the testator before the Court on this record.

Then the next objection regarding the defendants is, that they cannot go on unless Casement is here. Now, as I said before, I can conceive that a record might be so framed, stating certain circumstances, as that relief might have been given in the absence of Casement. I admit that there is a bare possibility of doing so; but here you insist that Casement expressly may be discharged from acting any longer as trustee. How is it possible to give that relief against a person who is not present? I think, therefore, that objection is sustained.

The last objection is in respect of one of the residuary legatees, who is stated to be dead. It is impossible to say that the facts, stated in the bill, are equivalent to proof that George Lowry did receive all his shares. I cannot perceive this on the face of the bill, which seeks that the residuary estate may be ascertained. It is stated, that James Lowry, who was the executor of the testator, who proved in England, has proved the will of George Lowry in the diocese of Down and Connor. What of that? This Court knows nothing of that; and it is quite a matter of course, when a bill is filed for the purpose of having the residue of a testator's estate ascertained, and for payment of the residue

among the parties entitled, that they must either have all the parties entitled before the Court, or give a good substantial reason why some of them are not before the Court. The fact of proving the will, in what I may call a foreign part of England, is of no importance, and that objection also is sustained.

Mill v. Fanning 5 T. R. Ch. 168

V.C. } WHATMAN v. GIBSON AND
April 4, 5. f. } GOMM.

Covenant—Nuisance—Injunction.

A, the proprietor of a piece of land which he had divided into lots with the intention of having a row of houses built, executed a deed, which he procured to be executed by all the purchasers of his lots, mutually covenanting, that no house in the row should be used as an inn or tavern:—Held, that this covenant was binding in equity upon an assignee of one of the covenantors, who purchased with notice of the deed; and an injunction was granted to restrain him from using his house as an inn.

No distinction between an hotel, and an inn or tavern, in construing a covenant against noxious trades.

By an indenture, dated the 28th of February 1799, and made between John Fleming the younger, of the one part, and William Petman, George Gibson, and the several other persons who should at any time seal and deliver the same indenture of the other part, reciting, that the said John Fleming was seized of a piece of land therein described, containing two and a half acres, situate at Ramsgate, in the county of Kent, and that the said John Fleming had laid out part of the said piece of land in separate lots, for the erection of a row of houses thereon, intended to be called "Nelson's Crescent," and that, in order to preserve some degree of similarity and uniformity of appearance in such intended row of houses, the said John Fleming had determined and proposed that it should be a general and indispensable condition of the sale of all or any part of the land intended to form such row, that the several proprietors of such land respectively, for the time being, should observe and abide by the several stipulations and

restrictions thereafter contained; and that he, the said John Fleming, and his heirs, should at all times observe the like stipulations and restrictions, as to such of the said lots or divisions as for the time being should remain unsold by him or them; and reciting, that the said William Petman and George Gibson had agreed to purchase certain lots in the said intended row, it was thereby mutually covenanted, and each of them, the said John Fleming, William Petman, George Gibson, and the several other persons who should at any time or times, sign, seal, and deliver the said indenture, for himself and herself, and for his and their heirs, executors, and administrators, did thereby covenant to and with the other and others of them, (amongst other things,) that none of the proprietors of any of the several lots or parcels of land intended to form the said row, for the time being, should, at any time or times, on any account or pretence whatsoever, erect, or suffer to be erected on any of the said several lots, any public livery stables or public coach-house, or use, exercise, or carry on, or suffer to be used, exercised, or carried on thereon, the trade or business of a melting foundry, tobacco pipemaker, common brewer, tallow-chandler, soap-boiler, distiller, *innkeeper*, *tavern-keeper*, *common ale-house keeper*, *brazier*, *working smith* of any kind, *butcher* or *slaughterer*, or any other noxious or offensive trade or business, whereby the neighbourhood might be in any respect endangered or annoyed; and that no other buildings than good dwelling-houses or *lodging-houses*, should be erected in front of any of the said lots.

John Fleming subsequently sold and conveyed one of the lots to Henry Cull, who executed the deed of 1799. A house, known as No. 6, Nelson's Crescent, having been built on this lot, Henry Cull sold it to the plaintiff; and by indentures, dated the 4th and 5th of March 1818, this lot was conveyed to the plaintiff, expressly subject to the stipulations and restrictions contained in the indenture of the 28th of February 1799.

Nelson's Crescent was completed according to the original plan, and the different houses became the property of various persons claiming under John Fleming.

In the year 1823, the defendant, John Holmes Gibson, became the purchaser of No. 7, in the Crescent, (which adjoined the plaintiff's house,) from a person who claimed under a former purchaser from John Fleming.

John Holmes Gibson never signed the deed of 1799, nor had he any express notice of its contents at the time of his purchase; but the abstract of title, with which he was furnished, set out a covenant contained in the conveyance to his vendor, that the house, No. 7, should not be affected by the stipulations contained in a certain indenture of the 28th of February 1799. It appeared from this abstract, that the first purchaser from Fleming was one Austen, and part of the consideration recited in his purchase deed, was the consideration of his having signed the deed of 1799. The defendant Gibson, however, by his answer, denied that Austen did, in point of fact, ever sign that deed.

The defendant, John Gomm, was the occupier of No. 7, under an agreement for a lease from John Holmes Gibson; and he, shortly before the filing of the bill, announced his intention of opening the house as an hotel, and painted on the outside, in front, the words, "Royal Victoria Hotel."

The bill was filed for an injunction to restrain the defendants from using the house No. 7, as an inn or tavern, or in any other manner contrary to the provisions of the deed of 1799.

The defendants, by their answers, said, they did not pretend that they were purchasers for valuable consideration without notice of the deed of 1799, but submitted, that they ought not to be affected thereby, and the defendant John Gomm said, "that he had no intention of using the house No. 7, as an *ale-house*, or *common inn*, nor of *keeping livery stables* or *post horses*, but he intended to use the same as a *private* or *family hotel* during the Ramsgate season, during which period noble and other families of the highest respectability had been accommodated there by the defendant."

Mr. Wigram and *Mr. Bosanquet* now moved for the injunction.—The case of *The Duke of Bedford v. the Trustees of the British Museum* (1), is an authority in the

(1) 2 Sugd. Ven. & Pur. App. 361; s. c. 2 Law J. Rep. (N.S.) Chanc. 129.

plaintiff's favour. Sir J. Leach, when that case was before him, did not have recourse to the ground upon which Lord Eldon confirmed his judgment on appeal, but gave a clear opinion that courts of equity will enforce these perpetual covenants, when they are of the essence of the enjoyment. The plaintiff is suing a party who claims under the deed. Austen cannot say that Cull did not execute the deed, because Austen's own title recites that he did. Can Austen's assignee be in a better situation? We rely, therefore, upon the express agreement contained in the deed, mutually binding on both parties, and notice of which deed is admitted by the defendants, who claim under Austen. Moreover, we submit, that as this covenant pertains most materially to the enjoyment of the land, it runs with the land at law.

Holmes v. Buckley, Prec. Chanc. 39.

City of London v. Nash, 1 Fonblanque, 355; s. c. 3 Atk. 515.

The Solicitor General and Mr. Harwood, *contra*.—The notice of motion is to restrain the defendant from using the house as an inn or tavern. He never intended to do so. A family hotel does not come within the letter or spirit of the terms of the covenant. Lodging-houses are allowed by the deed, and this is, in fact, meant to be a lodging-house, but not an inn. There is really no difference between a lodging-house and a family hotel, either as to the number, or respectability of the visitors, or the nature of their entertainment. It is true, that the licence which an hotel-keeper takes, would enable him to open a common inn, but that is no proof that the defendant intends to do so. The obvious meaning of the covenant was, to restrain parties from doing that which would be noxious to the neighbourhood. It is clear, however, that this is not a covenant running with the land and binding at law upon the assignee. It does not concern the premises, and the mode of occupying them with reference to the interest of any reversioner, because the defendants have the fee. It is not like the case of a rent or easement reserved in perpetuity to the use of the vendor, but it merely purports to restrain property from being used in a particular mode for ever, and to support such a covenant, otherwise than as a personal and

collateral covenant, there is no authority. Then, if this covenant does not run with the land at law, the case of *Keppell v. Bailey* (2) solemnly decided that a court of equity will not, although a purchaser may be affected with notice, give to the covenant a more extensive operation than the law allows it.

Mr. Wigram, in reply.

The VICE CHANCELLOR.—I cannot draw the distinction between an hotel and any other inn or tavern. The defendants, therefore, have brought themselves within the terms of the covenant in the deed of 1799. Now that deed recites, that it should be "a general and indispensable condition of the sale of all or any part of the land intended to form such row, that the several proprietors of such land respectively, for the time being, should observe and abide by the several stipulations and restrictions thereafter contained." Of this deed, the defendants admit they had notice. I take it for granted, that Cull and Austen executed the deed. Now, it appears to me, that the owner of each house in this row has a positive interest in having his neighbour's house used in accordance with the stipulations of that deed. Whatever difficulty, therefore, there may be in bringing an action upon the covenant, there is a plain agreement, which, as the defendants admit notice, a court of equity must consider binding on them.

Injunction granted.

M.R. }
Mar. 19. } COSTERTON v. COSTERTON.

Mr. Pemberton and Mr. Girdlestone, in this case, relied on an unreported case of *Illingworth v. Nelson*, a note of which has been prepared from the papers in the cause. (See next case.)

Mr. Barber and Mr. Preston, *contra*.
Mr. Turner for other parties.

The case stood over.

(2) 2 Myl. & K. 517.

M.R.	} ILLINGWORTH v. NELSON. SWAN v. NELSON.
June 17, 1825.	
V.C.	
July 15, 1828.	
L.C.	
Nov. 21, 1828.	
M.R.	
Feb. 19, 1830.	

Creditors' Suit—Practice—Contingent Debt—Apportionment.

There were two suits brought against the representatives of a testator, one a creditors' suit, and the other for a breach of trust. The accounts were taken in the first suit, and the debts, &c. ascertained, but the assets were insufficient to pay the debts in full, if the plaintiff in the second suit succeeded. The second cause not having been heard, the Court ordered a part of the assets to be set apart to answer the claims of the plaintiff in the second suit with the costs, and the residue was apportioned and paid to the creditors in the first suit.

The first of these causes, namely, *Illingworth v. Nelson*, was instituted in 1824, against the personal representatives of Caley Illingworth and of another person, both deceased, who had been the trustees of a marriage settlement; its object being to make them responsible for an alleged breach of trust, in respect of two sums, amounting to 2,800*l*.

The second suit of *Swan v. Nelson* was a common creditors' suit, commenced in June 1825, against the personal representatives of the same Caley Illingworth.

Under an order, made in both the causes, dated the 17th of June 1825, the representative of Caley Illingworth paid into court, in trust, in the two causes, the then balance of the personal estate. On the 27th of June 1825, the usual decree, in a creditors' suit, was made in the second cause; and it was referred to the Master to take an account of the personal estate, debts, &c. of the testator.

The Master found the amount of the debts of the testator, but did not include therein the debt claimed by the plaintiffs in the first suit, which had not at that time been substantiated; he also ascertained the amount of the assets applicable to the payment of those debts.

On the 15th of July 1828, the Vice Chancellor made an order for the taxation and payment of the costs of the second suit, and for the payment, out of the funds in court, of the several debts, by the Master's report, in the second suit, found to be due.

The plaintiffs in the first cause, who had not at that time obtained a decree, appealed from this order, which would have disposed of the principal part of the funds, and would have left little, if anything, applicable to the payment of their demand, if they succeeded in the first suit.

The appeal was heard before Lord Lyndhurst on the 21st of November 1828, who ordered that 300*l*., part of the assets, should be laid out in trust, in the two causes, to an account "of the costs of *Illingworth v. Nelson*," and to accumulate and form a fund to answer the costs of the said cause, according to the decree to be made therein; and the other funds were directed, after payment of certain costs, to be divided into two parts, according to the proportion which the claim of the plaintiffs, in the cause of *Illingworth v. Nelson*, bore to the amount of the debts proved in the cause of *Swan v. Nelson*; and the sum allotted to the creditors was directed to be apportioned and paid amongst the creditors, and the other part was to be retained in court to accumulate.

The Master accordingly divided the fund, and the whole assets, amounting to 1,760*l*.; he apportioned the sum of 532*l*. to the creditors, in respect of their demands in the second suit, amounting to 1,213*l*.; and he apportioned 1,228*l*. to answer the claim of 2,800*l*. of the plaintiffs in the first suit.

On the 19th of February 1830, the cause of *Illingworth v. Nelson* came on for hearing before the Master of the Rolls,—

Mr. Bickersteth and *Mr. Lovat* for the plaintiffs; and

Mr. Pemberton and *Mr. Ching* for the defendants.

The plaintiffs then obtained a decree⁽¹⁾; and it was stated, that a subsequent order was made for appropriating to the plaintiffs in the first suit, the fund set apart to answer the claims.

(1) See Reg. Lib. 1830, A, 3082.

V.C.
 Dec. 18, 1837. } JONES v. JONES.
 Jan. 12, 1838. }

Mortgage—Notice—Priority.

At law, different conveyances of the same tenement, take effect according to their priority in time; and where the legal estate is outstanding, the same rule prevails in equity, and different incumbrances rank according to their priorities in point of time.

A second mortgagee of a settled real estate, gave no notice of his incumbrance to the first mortgagee; and a third person, without notice of the second mortgage, having advanced to the mortgagor a further sum of money on the security of the same property, gave notice of his security to the first mortgagee, and also caused notice to be indorsed on the settlement:—Held, that the third mortgagee did not thereby obtain priority over the second.

In this case, it had been referred to the Master to inquire and state to the Court what mortgages or other incumbrances there were affecting the estates of F. L. Brown, and Eliza his wife, devised by the wills of Thomas Jones and James Whitworth; and it appeared by the Master's report, that Thomas Jones being seised in fee of tenements in Carmarthen, by his will, dated the 25th of May 1816, devised them to Robert Waters and William Jones, in trust to pay unto, or permit and suffer Sarah Harvey and her assigns to receive, the rents, issues, and profits of all the said freehold estates for her life, and after her decease then upon trust; and the said testatrix devised the same hereditaments unto, between, and among Mary Whitworth and Eliza Brown, by her then name of Eliza Whitworth, to hold unto and to the use of them, the said Mary Whitworth and Eliza Brown, their heirs and assigns, as tenants in common, with benefit of survivorship. James Whitworth being seised of a tenement called Gell Street House, by his will, dated the 7th of December 1821, devised it to the said Robert Waters and one John Hughes, in trust for Eliza Whitworth for her life, with remainder over. Eliza Whitworth married Frederick Lewis Brown, and before the marriage, by lease and release of the 20th and

21st of December 1822, the release being made between Eliza Whitworth of the first part, Frederick Lewis Brown of the second part, John Lewis and William Skyrme of the third part, and the said Robert Waters and John Hughes of the fourth part, the remainder in fee, expectant upon the decease of Sarah Harvey, of the tenements in Carmarthen, which had been devised by Thomas Jones, was conveyed to Lewis and Skyrme, to such uses as Brown and his intended wife should jointly appoint, with remainders over. By indenture dated the 24th of December 1824, between Frederick Lewis Brown and Eliza, his wife, of the one part, and Wm. Jones of the other part, in consideration of 436*l.* 11*s.* 6*d.* paid to Brown and wife by William Jones, the Gell Street House was demised to William Jones for ninety-nine years, if Eliza Brown should so long live; and in exercise of their power, Brown and wife appointed the remainder in fee of half of the tenements in Carmarthen, to the use of William Jones in fee, the whole redeemable on payment of 436*l.* 11*s.* 6*d.* and interest. By lease and release, dated the 14th and 15th of November 1825, the release being made between William Jones of the first part, Brown and wife of the second part, and Jane James, widow, of the third part, in consideration of 436*l.* 11*s.* 6*d.* paid to William Jones by Jane James, and of 223*l.* 8*s.* 6*d.* paid to Brown and wife by Jane James, William Jones assigned, and Brown and his wife confirmed to Jane James the property comprised in the term of ninety-nine years, in Gell Street House, to Jane James; and William Jones released, and Brown and wife appointed, released, and confirmed the remainder in fee, of half of the tenements in Carmarthen, to Jane James, the whole being redeemable on payment of 660*l.* and interest. By indenture dated the 14th of January 1826, and made between Brown and wife of the one part, and John Jones of the other part, reciting the will of Thomas Jones, and that Sarah Harvey was then in possession of the tenements devised by it, and that Eliza Brown had not disposed of her estate in reversion of and in the moiety of the said real estate, expectant upon the decease of the said Sarah Harvey; and after reciting the will

of James Whitworth, and the indentures of the 20th and 21st of December 1822, in consideration of 400*l.* paid by John Jones to Brown and wife, it was witnessed that Brown and wife appointed, granted, demised, and released the remainder in fee, of half of the tenements in Carmarthen, and also the Gell Street House, to John Jones, for the term of 500 years, redeemable on payment of 400*l.* with interest. There were no covenants for title; the only covenants were, one for payment of the mortgage money, for quiet enjoyment free from incumbrances, and for further assurance. By indenture dated the 18th of January 1826, in consideration of a further sum of 100*l.*, advanced by John Jones, a further charge for 100*l.* was made. The Master found, as a fact, that the two last-mentioned indentures were made and executed to John Jones, and that John Jones advanced and paid the sums of 400*l.* and 100*l.*, without any notice either to John Jones or to the solicitor, attorney, or agent of John Jones, of any charge or incumbrance on the said premises. And the report then proceeded, "And I find from the depositions of John Williams, that previous to the execution of the said indenture of mortgage, the said John Jones inquired of the said Frederick Lewis Brown, if there existed any incumbrances on the said mortgaged premises, at the time the said John Jones obtained such two last-mentioned securities from the said Frederick Lewis Brown; and the said John Jones, also, previous to the execution of the said indentures of mortgage, caused inquiries to be made of the said John Hughes and Robert Waters, as to whether there were any mortgage incumbrances upon the estates mentioned in the said deeds of the 14th and 18th of January 1826; and the said John Williams, by the direction of the said John Jones, some few days previous to the said 14th of January 1826, went to the said John Hughes and Robert Waters, and asked each of them, the said John Hughes and Robert Waters, if there was or were any mortgage incumbrance or incumbrances upon the hereditaments and premises mentioned and described in the said deeds of the 14th and 18th of January 1826, and that each of them, the said John Hughes and the said Robert Waters, declared to the said John Williams, that there

was no mortgage or any other incumbrance to their knowledge; and each of them at the same time assured the said John Williams, that they believed that there was no mortgage, or any other debt or incumbrance upon the hereditaments and premises mentioned in the said deeds of the 14th and 18th of January 1826."

It was also stated, that in 1826, Brown applied to John Harries to lend him 800*l.*, and proposed to secure it by a mortgage of the equity of redemption of all the hereditaments and premises comprised in the indentures of the 24th of December 1824, and the 15th of November 1825;—that John Harries referred Brown to his solicitor, Mr. Thomas, to whom Brown furnished copies of the indentures of December 1824 and November 1825, and assured the solicitor and Harries, that there was no incumbrance upon the said hereditaments and premises, save only the mortgage to Jane James, whereupon Mr. Thomas obtained an inspection of the indenture of 1822, and the title-deeds, which were in possession of William Jones, as the solicitor of Jane James, in order to ascertain for the safety of Harries, whether there was indorsed upon such indenture, or any other of the title deeds, any incumbrance upon the said hereditaments previous or subsequent to the deed of December 1822, when Mr. Thomas found there was none; and asked William Jones, if there were or was any incumbrances or incumbrance upon or affecting the said hereditaments or premises, or any part thereof, other than the said mortgage of the 24th of December 1824; and the said William Jones told the said Mr. Thomas he knew of none.

The defendant, John Harries, then lent to F. L. Brown, the sum of 800*l.*; and by indentures of lease and release of the 16th and 17th of November 1826, and made between Brown and wife of the one part, and Harries of the other part, after reciting the two wills and the indentures of the 21st of December 1822, the 24th of December 1824, and the 15th of November 1825, Brown and wife conveyed and appointed to Harries, their equity of redemption in the property comprised in the indenture of the 24th of December 1824, subject to redemption on payment of 800*l.* and interest. The report then stated, that this deed was duly executed and attested,

and that as a security to him, the said defendant John Harries, he, on the said 17th of November 1826, caused a notice in writing to be given, and the same was indorsed upon the said indenture of release or settlement of the 21st of December 1822, and which notice was in the words and figures following, that is to say:—"Notice to whom it may concern, that the equity of redemption of the reversion expectant upon, and to take effect immediately on the decease of Miss Sarah Harvey, of the county of the borough of Carmarthen, of and in one undivided moiety or half part, the whole into two equal parts being divided, of and in all and singular the messuages, tenements, farms, lands, and hereditaments within mentioned and described, have been (subject to the payment to Jane James, widow, of 660*l.* and interest, already secured by mortgage thereon,) by us, the within named, by indentures of lease and release, and appointment, the release and appointment bearing even date herewith, granted and released, directed, limited, and appointed unto and to the use of John Harries, of the parish of Llangathen, in the county of Carmarthen, farmer, by way of mortgage, to secure the sum of 800*l.* and interest, payable as in the said indenture of release and appointment mentioned. Dated the 17th of November 1826. F. L. Brown, Eliza Brown."

The Master found there were three incumbrances on the property devised by the two wills; and he found that the priorities of such mortgages were as follows: first, the mortgage to William Jones; secondly, the mortgage to Harries; and thirdly, the mortgage to John Jones.

To this report, exceptions were taken, which now came on for argument.

Mr. Knight Bruce and *Mr. G. Richards*, for the plaintiffs, the representatives of John Jones, who, in point of time, was the second mortgagee, contended—that they were entitled to priority over Harries's mortgage. That where the legal estate, as in this case, was outstanding, the priority of incumbrances depended upon the priority of their dates. That the fact of the third mortgagee giving notice, and having it indorsed on the marriage settlement, did not alter the priorities; and that the doctrine of a priority being obtained by giving notice, only applied to choses in

action and trusts of personality. Here; the subject of the mortgage was real estate, to which the rule had no application; and it was settled that a first mortgagee was not a trustee. That the point had been settled by the case of *Peacock v. Burt* (1).

Mr. Jacob and *Mr. Coleridge*, for Harries, contended, that the neglect of John Jones to make proper inquiries, and to give notice, amounted to a fraud on subsequent incumbrances; and that Harries, who had given notice, and taken all due precautions, was entitled to priority over John Jones's security. The point, they said, was decided by—

Dearle v. Hall, 3 Russ. 1; s. c. 2 Law J. Rep. Chanc. 62.

Loveridge v. Cooper, *ibid.* 30; s. c. *ibid.* 75.

And *Foster v. Blackstone* (2) shewed that the doctrine applied to trusts of real estate.

The VICE CHANCELLOR, after stating the facts, and the Master's finding, proceeded:—To this report an exception has been taken; and the question is, whether the report is right, as to the priorities. At law, the rule clearly is, that different conveyances of the same tenement take effect according to their priority in time. If a man seised in fee, first grants one term of years and then another, the second termor cannot enter till the first term has ceased by effluxion of time, surrender or otherwise; so, if freehold interests be carved out of the fee by different conveyances, the estate of the second grantee cannot take effect in possession till the estate of the first has in some manner ceased. The effect of different conveyances is the same as if different successive estates were granted by the same conveyance, first in possession, and then in remainder. Equity follows the law; and where the legal estate is outstanding, conveyances of the equitable interest are construed and treated in a court of equity in the same manner as conveyances of the legal estate are construed and treated at law. In *Beckett v. Cordley* (3), which Lord Eldon notices in *Ex parte Camthorne* (4), and in *Martinez v.*

(1) Coote on Mortgages, App. 693; s. c. 4 Law J. Rep. (N.S.) Chanc. 33.

(2) 1 Myl. & K. 297; s. c. 2 Law J. Rep. (N.S.) Chanc. 84.

(3) 1 Bro. C.C. 353.

(4) 1 Glyn & Jam. 243.

Cooper (5), Lord Thurlow twice decided, that where the legal estate was outstanding in a first mortgagee, of two subsequent equitable incumbrancers, he who is prior in time must be prior in equity. His words are—the second equitable incumbrancer “had the security he trusted to; he knew he had not the legal estate; he trusted to the honour of the borrower.” In the present case, no such question arises as is noticed in *Willoughby v. Willoughby* (6), or as in *Evans v. Bicknell* (7), where Lord Eldon alludes to what fell from Buller, J. in *Goodtitle v. Morgan* (8); for Harries, the third incumbrancer, has not got in the legal estate, nor has he any declaration of trust from the holder of it, nor has possession of the mortgage deeds conveying the legal estate, or of any other of the title deeds. He gave notice of his incumbrance to the first mortgagee; but, according to what the present Lord Chancellor decided in *Peacock v. Burt*, such a notice is of no value. The fact is, that upon Harries’s answer, and before the Master, as well as in the argument at the bar, the case of Harries was attempted to be put upon the decisions in *Dearle v. Hall*, *Loveridge v. Cooper*, and *Foster v. Blackstone*, decided by Sir J. Leach, and afterwards affirmed by the Lords. But in each of those cases, the subject of discussion was a chose in action. According to what is said by Lord Lyndhurst, in *Forster v. Cockerell* (9), on moving to affirm the decree in *Foster v. Blackstone*, and to what is said by the present Lord Chancellor in *Peacock v. Burt*, in Mr. Cootes’s valuable treatise on Mortgages, p. 607, one principle established by *Dearle v. Hall*, and *Loveridge v. Cooper*, was, that in order to complete the transfer of a chose in action, notice to the legal holder of the fund is necessary. In *3 Russ.* 22, Sir T. Plumer says, “The law of England has always been, that personal property passes by delivery of possession, and it is possession which determines the apparent ownership;” and by way of preserving the analogy between personal chattels in possession, and choses in action, he says, in p. 24, “Notice then is neces-

sary to perfect the title to a chose in action, to give a complete right ~~in rem~~, and not merely a right as against him who conveys his interest.” But what is stated by the Lord Chancellor, in *Hearn v. Mill* (10), is unquestionably true: “There is a marked distinction between a real estate and a personal chattel. The latter is held by possession, the real estate by title.” In *Loveridge v. Cooper*, Sir T. Plumer says, “It is of the utmost importance to the interests of mankind, that plain and clear rules of property should be laid down, and that, when laid down, they should not be frittered away by nice and frivolous distinctions. Broad distinctions must be preserved; and it is of the utmost importance that an equity of redemption of real estate should not be taken to be a mere equitable interest in the nature of a chose in action.” Jones, the first incumbrancer on the equity of redemption, took his title by the conveyances of January 1826, and notice or possession was not necessary to complete his title. Harries took his title by a subsequent conveyance, and merely gave a notice, which did not and could not affect Jones. No fraud whatever can be imputed to Jones. He made some inquiry and was misled; he was the innocent subject of fraud, and not the doer of it; and, in my opinion, the exception must be allowed.

V.C.
L.C. } KING v. BRYANT.
Jan. 27, 81.

Practice.—Contempt.

The defendant in a foreclosure suit being in contempt for want of answer, the plaintiff took the bill pro confesso, and proceeded to have the accounts taken in the Master’s office ex parte, and without serving warrants on the defendant: and he afterwards had the Master’s report confirmed absolute, in the first instance:—Held, that the defendant was entitled, although in contempt, to be heard to show the irregularity of these proceedings; and that the proceedings were irregular.

This was a bill filed by a mortgagee against a mortgagor for a foreclosure. The defendant having appeared, but neglecting

(5) 2 Russ. 214.
(6) 1 Term Rep. 763, 772.
(7) 6 Ves. 183.
(8) 1 Term Rep. 762.
(9) 3 Cl. & Fin. 456.

(10) 13 Ves. 119.

to answer, was committed for contempt. The plaintiff afterwards proceeded to take the bill *pro confesso*, and on the 8th of May 1837, obtained the usual decree referring it to the Master to take the usual accounts of the mortgage money, interest, and costs, and to fix a day for payment; and in default of payment, that the defendant should be foreclosed.

The plaintiff proceeded to take the accounts in the Master's office *ex parte*, and without serving warrants on the defendant. The Master made his report, dated July 1837, whereby he certified the amount due to the plaintiff, and appointed the 22nd of January 1838 for payment. This report was confirmed by an order absolute in the first instance. The plaintiff did not serve this order on the defendant, and it appeared that the first information that he had of these proceedings, was in August 1837. An application was now made by the defendant, by petition, stating specific errors in the account, and praying that the order, confirming the report, might be discharged, and that the Master might review his report.

Mr. Elderton appeared in support of the application; and—

Mr. Purvis on behalf of the plaintiff.

The VICE CHANCELLOR decided, that while the defendant continued in contempt, he was not entitled to be heard.

The defendant appealed from this decision to the Lord Chancellor.

Mr. Purvis again raised the same objection, that the defendant, being in contempt, was not entitled to be heard, and cited—

Beames's Orders, 35.

Vowles v. Young, 9 Ves. 172.

Anonymous, 15 Ves. 174.

Odell v. Hart, 1 Molloy, 492.

Lord Wenman v. Osbaldiston, 2 Bro. P.C. 276.

Mr. Elderton, for the defendant, contended, that notwithstanding the defendant's being in contempt, he was entitled to be heard to rectify irregularities in the Master's office.

Dominicetti v. Latti, 2 Dick. 588.

Parker v. Dawson, 5 Law J. Rep. (n.s.) Chanc. 108.

The LORD CHANCELLOR decided that the defendant was entitled to be heard, but

directed the case to stand over to make inquiry as to the regularity of the practice of taking the accounts *ex parte*, and confirming the report without a previous order *nisi*;—he said his present impression was, that such practice was irregular.

Jan. 31.—Mr. Purvis contended, that, by having avoided putting in an answer, the defendant had evaded setting forth any accounts, or charging himself in any way; and that, if the defendant were now allowed to be heard, notwithstanding his being in contempt, he would be in a better position than if he had not committed the irregularity which was complained of.

The LORD CHANCELLOR.—In this case, the plaintiff having placed the defendant in contempt for want of an answer, proceeds to take the bill *pro confesso*; he then goes into the Master's office, and takes the account *ex parte*; and the result is, that the Master finds a certain sum to be due, upon which the plaintiff proceeds to foreclose the estate. What I wished to have discussed was, whether the plaintiff was regular in that proceeding, or whether he ought not to have served warrants on the defendant, and also to have served him with the order *nisi*, before confirmation.

It would be a most unjust proceeding to foreclose the defendant without giving him any opportunity of being present, and protecting his rights, and if such were the course, it is so manifestly unjust that I would not follow it; but there is no such practice. It now appears, that, under the circumstances which have occurred here, an order confirming the Master's report absolute in the first instance, is irregular, and that the plaintiff must first get an order *nisi*; then why would this be necessary if the defendant was not entitled to service of the order *nisi*? The necessity for the order *nisi* assumes the necessity of the accounting party being present at the taking of the accounts. Where the defendants will not answer, the Court gives to the plaintiff the benefit of a decree *pro confesso*, but the duty of the officer of the Court is to execute that decree in the ordinary way, and no authority is to be found for taking the accounts *ex parte*. Such was the opinion of the Court in 1780,

as appears from the case of *Dominicetti v. Latti*.

The plaintiff here has proceeded *ex parte*, when he ought to have proceeded by warrants; and the present application is to protect the defendant against an order for a foreclosure obtained upon an irregular report, which can only be considered as a nullity. The cause must therefore be referred back to the Master generally.

Nota.—Registrar's note of *Dominicetti v. Latti*. On the 10th of March 1780, exceptions came on, and on the 21st of July 1780, the Lord Chancellor "referred it to the Masters of the Court for them to certify what is and hath been the practice in similar cases, and exceptions to stand over in the meantime." The Masters made their certificate, which could not be found; it must therefore be assumed to have been against the exceptions, as on the 7th of August 1780, the Lord Chancellor overruled the exceptions.

M.R.
Feb. 28; }
March 1. } DAVIES v. DOWDING.

Mortgage—Infant—Sale.

Where the heir of a mortgagor is an infant, the mortgagee is not entitled to a sale of the estate, unless it appears, upon reference to the Master, to be for the benefit of the infant; otherwise the mortgagee is entitled to a foreclosure only.

Where, from the facts, the Court is able to see that it will be for the benefit of the infant that a sale should take place, it will order a sale without a previous reference to the Master.

Mr. Pemberton, in this case, on behalf of a mortgagee, asked for an immediate decree for a sale of the estate, as against the defendant, the infant heir of the mortgagor.

Mr. Romilly, for J. W. Courtney, the infant, contended, that the mortgagee was not entitled to a sale of the mortgaged estate, no power of sale being contained in the mortgage deed; he insisted, that a mortgagee was entitled to a decree for a foreclosure only, and that the circumstance of there being an infant heir, made no difference, a sale being directed only for the benefit of an infant—*Monday v. Monday* (1).

(1) 1 Ves. & Bea. 223; and see Coote, 600.

Mr. Pemberton, in reply, insisted that the mortgagee was in all cases entitled, as against the infant heir of a mortgagor, to have the estate sold, that is, the security realized, and applied in payment of the mortgage debt; but—

The MASTER OF THE ROLLS said, he did not consider such to be the rule; for the estate might be more than sufficient to pay the debt, and it might be for the interest of the infant that the mortgage debt should be paid off. That he believed the course to be, to refer it to the Master, to inquire whether it would be for the infant's benefit that a sale should take place; and if the Master so found, the plaintiff might have a sale, otherwise he was entitled to a decree for a foreclosure only. As the matter had, however, been pressed, he would inquire as to the practice in such cases.

Mar. 1.—The MASTER OF THE ROLLS.—I have made inquiry, and find there is no doubt of the practice. In such cases, the Court refers it to the Master, to inquire whether it will be for the benefit of the infant, that a sale shall take place of the mortgaged estate. There have been cases before me where I have been satisfied that it would be for the benefit of the infant, and have directed a sale without a reference to the Master. If there were facts before me, which made it clearly for the benefit of the infant, I would not make the reference so as to give the benefit of the delay to either party.

L.C. }
Mar. 16, 23. } *In re JOHN WELCH.*

Lunatic Trustee—1 Will. 4. c. 60.

Several trustees appointed on petition, under the act 1 Will. 4. c. 60, in the stead of a sole surviving lunatic trustee.

New trustees appointed, under the act, of a sum of money charged by will upon real estates in the West Indies, and another sum secured by a bond.

By a marriage settlement, dated the 8th of May 1802, the sum of 4,000*l.* charged upon estates in Antigua, and a sum of 4,000*l.* currency, or 2,500*l.* sterling, secured by a bond, were assigned to Sir George Belton, Knt., Anthony Minton,

and John Welch, upon certain trusts. John Welch was a lunatic, or person of unsound mind, and the property was vested in him alone, as the surviving trustee, upon the trusts of that indenture, such trusts being for the petitioners.

The Master, to whom the matter had been referred, found these facts, and that John Welch was a trustee within the intent and meaning of the before-mentioned act of parliament, and had not any beneficial interest therein; and he approved of four persons whose names were mentioned in the report, as proper persons to be appointed trustees in the place of John Welch, of the sum so vested in him; and he also approved of another person, to assign the same in the place of John Welch, to the new trustees so approved.

A petition was now presented for the confirmation of the Master's report, and that the persons approved by the Master as new trustees of the deed of 1802, might be appointed such new trustees accordingly.

Mr. Sharpe appeared in support of the petition.

The LORD CHANCELLOR at first expressed some doubt, whether the case was within the provisions of the act of parliament; but on a subsequent day he stated, that although that part of the act which related to such cases was obscure, yet, upon consideration, he was of opinion, that the case was within the act; and that he would, therefore, make the order.

L.C. } NIAS v. THE NORTHERN AND
Mar. 28. } EASTERN RAILWAY COMPANY.

Production of Papers—Discovery—Professional Confidence.

This was an appeal from the decision of the Master of the Rolls, which will be found reported, *ante*, p. 142.

Mr. Wigram and Mr. O. Anderson contended, that as the case in question had been submitted, and the opinion given, not when the matters were in litigation, but when they were only in dispute, the defendants could not resist their production

—*Desborough v. Rawlings* (1), and *Story v. Lord George Lennox* (2).

The case required to be produced was, they said, in reality the plaintiff's, and not the defendants'; it proved the plaintiff's case against that set up by the defendants.

Mr. Tincey and Mr. J. Parker, contra, were not called on to support the order of the Master of the Rolls.

The LORD CHANCELLOR.—I never had any doubt in my mind as to what the rule of privilege was, but the difficulty is in its application. To say, that parties are to wait, and not consult counsel till actual litigation has commenced, originates a distinction without any reason. Parties must be at liberty at all times to communicate with their professional advisers, as to matters which may come in question, whether a bill has been filed or not, and they must be unrestrained in such communications. What possible difference in principle can there be, whether statements are made to counsel by writing or by parol? It is not pretended, that statements made by a client to his solicitor could be ordered to be disclosed: then, why should any other professional advice? Where the communication is confidential, there can be no possible distinction, whether litigation has or not actually commenced at the time that the communication is made, or the advice given. On this point, I entertain no doubt. The only question is, as to the manner in which the privilege is stated and insisted on in the answer, for much depends on that. The statement in this case is, that the defendants have in their possession "cases submitted to counsel, and the opinions thereon, which were submitted after the dispute had arisen, and bore reference thereto." All that was laid down in *Story v. Lord George Lennox* was, that the party must properly state his ground of objection in his answer. Here, the ground of exemption having been sufficiently stated by the answer, the appeal must be dismissed, but without costs, in consequence of the recommendation of the Master of the Rolls.

(1) *Post*.

(2) 1 Myl. & Cr. 534; s. c. 6 Law J. Rep. (n.s.) Chanc. 99.

M.R.
Nov. 23, 24. }
L.C. } DESBOROUGH v. RAWLINS.
Feb. 8, 1838. }

Solicitor and Client—Privileged Communication.

A defendant declined answering certain matters, stating, that he was present at the time they occurred, as the solicitor of the other defendants, and that he had acquired his information solely and only from the fact of his being present at the time in his capacity of solicitor:—Held, on appeal, that the defendant, not having also shewn that the circumstances were such as to make the communication privileged, was bound to answer more fully.

This case came before the Court on exceptions to the report of the Master, to whom the defendant's answer had been referred for insufficiency. The bill had been filed by the Atlas Insurance Company against two of the directors of the Eagle Insurance Company, Mr. Smith their actuary, and Messrs. Beetham, their solicitors, praying that a policy of insurance on the life of John Cochrane might be declared fraudulent and void, and for an injunction to restrain the Eagle Company from proceeding in an action at law thereon. The defendants, the Eagle Company, had, on the 24th of September 1834, effected an insurance with the plaintiffs for a sum of 4,000*l.* for four years, on the life of Cochrane, who died shortly afterwards. The Atlas Company having resisted payment of the 4,000*l.*, an action at law was commenced by the Eagle Company for the recovery of that sum. The plaintiffs then filed this bill for the object above mentioned, and the effect of the statements in the bill was, that Cochrane was not, to the knowledge of the defendants, an insurable life; and that the defendants had suppressed and concealed many material circumstances, as to Cochrane's state of health and manner of living; and amongst others, that insurances on the life of Cochrane, proposed by the Eagle Company, had been rejected by other companies at the time the insurance with the Atlas was effected. The bill stated, that on the 18th of September 1834, a proposal had been

made, on behalf of the Eagle, to the Economic Company for an insurance by them on the life of Mr. Cochrane for 4,000*l.*; and Mr. Travers, the medical officer of that company, having examined him, by letter, dated the 20th of September 1834, made so unfavourable a report on his state of health and habits, as to cause the Economic to reject the proposal for an insurance on his life, and that this had been done previous to the insurance being effected with the Atlas.

The bill contained the following statement:—"That on Monday, the 22nd of September 1834, Mr. Downes, the actuary of the Economic Company, called at the office of the Eagle Company, and took with him the aforesaid letter of Mr. Travers, and Mr. Downes then had an interview with Henry Porter Smith, and told him that the Economic Company had had an unfavourable report of said John Cochrane, and that the proposed assurance on his life would be refused by the Economic Company, and that Mr. Downes thought it right to apprise the Eagle Company thereof immediately, and in candour to shew them Mr. Travers's said letter, which was the reason of the refusal; and Mr. Downes then handed over to Henry Porter Smith the letter of Mr. Travers, of the 20th of September 1834, and Henry Porter Smith took and perused the letter, and after having read it, he returned it to Mr. Downes, who thereupon went back to the office of the Economic Company, and wrote and sent to the Eagle Company a formal letter of rejection of the proposed assurance on the life of the said John Cochrane."

The defendants were required to answer these statements of the bill, which statements were turned into interrogatories in the usual form, and which will be found hereafter stated in the answer of Messrs. Beetham.

Messrs. Beetham, by their answer, denied all fraud; and in reference to the above allegation and the interrogatories thereon, stated as follows:—

"And Francis Beetham saith, and Albert William Beetham believes it to be true, having no knowledge of the same, save as being informed by the said Francis Beetham, that some one or two days before

the 24th of September 1834, which this defendant, Francis Beetham, does not recollect, an interview took place between Mr. Downes and Henry Porter Smith, at the office of the Eagle Company, where Mr. Downes called, but they, these defendants, refuse to answer or to discover, and set forth, whether, at such time as last mentioned, when the said Mr. Downes did call at the office of the Eagle Company, he did at such time take with him the aforesaid letter of Mr. Travers, and whether Mr. Downes did, at the interview with Mr. Downes and Henry Porter Smith, make such statements, and give such information to the said Henry Porter Smith, as thereinbefore in that behalf in the said bill particularly alleged, and did then make any and what statement relative to the matters in the said bill mentioned, to the like, or any other, or what purpose or effect, and whether Mr. Downes did then, after any statement, hand over to Henry Porter Smith the aforesaid letter of Mr. Travers, and whether Henry Porter Smith did take and peruse the aforesaid letter: but this defendant, Francis Beetham, for himself saith, and this other defendant saith he believes the same to be true, that Francis Beetham was the only person present at the said interview between Mr. Downes and Henry Porter Smith; and these defendants do so refuse to answer and set forth, because they say, that long before, and on the said 22nd of September 1834, they, these defendants, were the solicitors and attorneys, and the professional and confidential advisers of the Eagle Company, and that this defendant, Francis Beetham, *was present at the aforesaid interview, as the solicitor and attorney, and professional adviser of the said Eagle Company, and acquired his information touching all and singular the matters and things which these defendants have as aforesaid refused to answer and discover, and set forth, solely and only from the fact of his being present at the time in his capacity of such solicitor and attorney, and professional and confidential adviser; and these defendants humbly submit that they are not bound, therefore, to answer all or any of such matters and things.*

The plaintiff referred this answer for insufficiency, and it was so reported by the

Master. The defendant excepted to the Master's report, and the exceptions now came on for argument before the Master of the Rolls.

Mr. Pemberton and Mr. W. H. Clarke, for the defendants.—A solicitor is privileged from divulging, not only confidential communications, which take place between himself and his client, but all facts which come to his knowledge in his professional capacity. In *Greenough v. Gaskell*, Lord Brougham says—"If touching matters that come within the ordinary scope of professional employment they receive a communication in their professional capacity, *either from a client or on his account, and for his benefit, in the transaction of his business*, or which amounts to the same thing, if they commit to paper in the course of their employment on his behalf, matters which they know only through their professional relation to the client, they are not only justified in withholding any such matters, but bound to withhold them, and will not be compelled to disclose the information, or produce the papers in any court of law or equity, either as party or as witness." Here the defendant says he was present in his professional capacity, and acquired his information "solely and only from the fact of his being present at the time in his capacity of such solicitor and attorney." The defendants have, therefore, brought themselves within the rule, and are protected from answering these matters.

Mr. James Russell, for the plaintiffs, in support of the Master's report.—Privilege extends merely to communications from a client to his solicitor, or from a solicitor to his client: here there was no confidential communication between Beetham and his client, but a communication made by Downes on the part of an adverse company, to Smith, the actuary of the Eagle. In order that a communication may be privileged, it must be confidential between all parties: here there was nothing private or confidential, for Downes went to the Eagle office, and publicly stated that the Economic would not accept the offer; he said, "Here is a letter from Mr. Travers, which makes it impossible to proceed." Downes, or Smith, might be compelled to answer all these facts, and for what reason then should Beetham be protected from an-

swering them? If his privilege extends to this part of the bill, it would, for the same reason, extend to every other part. The reason for exempting a solicitor from divulging statements made to him by his client, is, that they may freely confer together; here the reason is not applicable: a conference takes place between other parties, and there being no litigation at the time, the solicitor happens accidentally to be present. If a solicitor were present with his client, and saw him commit a felony, would he be exempted from giving his testimony merely because he happened to be conferring at the time on other subjects with his client?

Mr. Pemberton, in reply.

The following authorities were cited at the hearing, and on the appeal:—

Robson v. Kemp, 5 Esp. 52.

Greenough v. Gaskell, 1 Myl. & K. 98.

Doe v. Sherrard, 5 Car. & P. 592.

Knight v. Turquand, 2 Mee. & W. 98;
s. c. 6 Law J. Rep. (N.S.) Exch. 12.

Starkie on Evidence, p. 230.

Brammell v. Lucas, 2 Barn. & Cress.
745; s. c. 2 Law J. Rep. K.B. 161.

Parkhurst v. Lowten, 2 Swanst. 216.

Williams v. Mundie, 1 Ry. & M. 34;
s. c. 1 C. & P. 158.

Sawyer v. Birchmore, 3 Myl. & K. 572;
s. c. 4 Law J. Rep. (N.S.) Chanc. 249.

Paxton v. Douglas, 19 Ves. 225.

Thorpe v. Macauley, 5 Mad. 218.

And see *Wheatley v. Williams*, 5 Law J.
Rep. (N.S.) Exch. 287.

Moore v. Terrell, 4 B. & Ad. 870.

The MASTER OF THE ROLLS said he would look at the case and the authorities, although he had a strong impression on the subject.

Nov. 23.—The MASTER OF THE ROLLS.—I have looked into the cases cited, and particularly the opinions of Lord Abinger and Lord Tenterden. In this case it appears that the defendant was a solicitor; and he says, that he acted as solicitor or attorney of the defendants, and that, acting in that capacity, he was present on the occasion, and so acquired the information. I think that, under the weight of the authorities, I must allow the privilege; though I must confess I have some doubts as to the policy of carrying it so far—but I

am governed by the weight of authority; and must, therefore, allow the exceptions.

The plaintiffs appealed from the above decision.

L.C.—Feb. 8.—*Mr. Wigram* and *Mr. James Russell*, in support of the appeal.

Mr. Wakefield and *Mr. W. H. Clarke*, contra.

The LORD CHANCELLOR—[after stating the case, and referring to the cases of *Greenough v. Gaskell*, *Brammell v. Lucas*, *Sawyer v. Birchmore*, *Spenceley v. Schulenburg* (1)]—said, that the question was, whether the defendant had by his answer brought the case within the limits of professional privilege; and he was of opinion, that the statements in the present answer were not such as to protect him from making the disclosures. For anything that appeared, the solicitor might have been in the room accidentally. Besides which, the communication was from a party to a certain degree adverse, and which in *Spenceley v. Schulenburg* was held not to be privileged. That the answer was therefore insufficient, and the plaintiff was bound to answer more fully; he might then, perhaps, state such circumstances as would shew that the communication was confidential.

Order of the Master of the Rolls reversed.

M. R.

Feb. 2;

Mar. 26.

MACDONALD V. BRICE.

Thellusson Act—Will—Construction—Accumulation.

Bequest of a residue to R. S, an infant, on his coming of age, and failing him, to the next male child of P. S. who should attain twenty-one, and failing such child, to A, B, C, and D. The dividends were directed to be applied towards the maintenance, &c. of R. S, during his minority. R. S. died an infant, and P. S, who was living, had no son:—Held, that the accumulations of the income of the residue, beyond that permitted by the Thellusson Act, did not belong to A, B, C, and D, but to the next-of-kin, as undisposed of residue.

(1) 7 East, 357.

Major Robert Shawe, by his will, dated the 20th of March 1812, after appointing executors, and giving certain legacies and annuities, expressed himself as follows: "Lastly, the residue of my property I will and bequeath unto Robert Shawe, the eldest son of the afore-mentioned Peter Shawe, for his sole use and benefit, upon the said Robert Shawe's coming of age, failing him, to the next male child procreate of the body of the aforesaid Peter Shawe, lawfully begotten, who shall attain the age of twenty-one years; failing the male children of the said Peter Shawe, lawfully begotten, to the afore-mentioned legatees, or the survivor or survivors of them, in equal proportions, namely, Misses Anne Margaret, and Elizabeth Macpherson, and Mrs. Christy Grant, Mrs. Isabella Macdonald, Mrs. Mary Macdonald, and Mrs. Anny Maclean, all daughters of the afore-mentioned Lewis Macpherson, Esq., of Dalraddy, North Britain, their respective shares to be at their free will and disposal. And whereas the aforesaid Robert Shawe, the residuary legatee named by this will, is now under age, I do constitute and appoint my aforesaid executors, Francis Duncan and Alexander Bryce, and the survivor of them, guardians and guardian of the said child, during his minority; and my will is, and I do direct, that they do apply the dividends arising from the property belonging to me, which may remain after paying the different legacies, and setting apart a sufficient sum for the payment of the annuities hereinbefore bequeathed, together with my funeral expenses, my debts being all paid, to the maintenance, education, and benefit of the said child, as they shall judge most advantageous for him; and, in the event of his death before his reaching the age of twenty-one years, I do also constitute and appoint the said Francis Duncan and Alexander Bryce, and the survivor of them, to be guardians and guardian of the male child, lawfully begotten of the said aforesaid Peter Shawe, who may succeed according to the before-recited disposition, in this my last will and testament, with power to the said Francis Duncan and Alexander Bryce, and the survivor of them, as guardians and guardian, to apply the dividends aforesaid to the purposes above mentioned."

The testator died on the 11th of April 1812. Robert, the son of Peter Shawe, survived the testator, but died in August 1814, an infant, of the age of eight years, and Peter Shawe had no other son. As the gift to the daughters of Lewis Macpherson was made contingent upon the failure of male children of Peter Shawe, and Peter Shawe was still living, and might have sons, it had been considered that the income of the residue of the testator's estate ought to be accumulated for the benefit either of a male child of Peter Shawe, if he should come into *esse*, or the daughters of Lewis Macpherson, if he should die without having a son. Accordingly, such accumulation was stated to have been made as long as the statute of the 39 & 40 Geo. 3. c. 98. would permit; and the period of accumulation having expired, the question was, to whom the income of the residue of the testator's estate, and of the accumulation lawfully made, was to be paid, until it should appear that Peter Shawe had not a son to take the residue with the accumulation, which would clearly belong to the daughters of Lewis Macpherson, if there should be no such son. The statute in question (the Thellusson Act,) says, in every case where any accumulation shall be directed otherwise than as aforesaid, such direction shall be null and void, and the "rents, issues, profits, and produce of such property so directed to be accumulated, shall, so long as the same shall be directed to be accumulated contrary to the provisions of this act, go to and be received by such person or persons as would have been entitled thereto, if such accumulation had not been directed."

The plaintiffs in this case, were four of the daughters of Lewis Macpherson, and they, together with some of the defendants, contended, that until the contingency should be determined, the income of the lawfully accumulated residue belonged to them.

On the other hand, the next-of-kin of the testator claimed all the accumulations which accrued subsequent to the period limited by the Thellusson Act, for accumulation.

Mr. Pemberton and *Mr. Stuart*, for the plaintiffs; and—

Mr. Mylne, for defendants in the same interest.

Mr. Tinney, Mr. Lovat, Mr. Romilly, and *Mr. Koe*, for the next-of-kin of the testator.

Shaw v. Rhodes, 1 Myl. & Cr. 135.

Haley v. Bannister, 4 Mad. 275.

Griffiths v. Vere, 9 Ves. 127.

Leake v. Robinson, 2 Mer. 363.

Skrymsher v. Northcote, 1 Swanst. 566.

Belt v. Slack, 1 Keen, 238.
were cited.

The MASTER OF THE ROLLS postponed his judgment.

March 26.—The MASTER OF THE ROLLS.—In this case of *Macdonald v. Bryce*, the bill prays an account of all the personal estate and effects of the testator Robert Shawe, which have been possessed or received by the defendant Alexander Bryce, or by any person or persons by his order, or for his use, or which, without his wilful default, might have been possessed or received, and that the clear residue of the said testator's personal estate and effects, and of the accumulations thereof, may be ascertained and secured, and that it may be declared that in default of any male child of the said Peter Shawe, lawfully begotten, who shall live to attain the age of twenty-one years, the plaintiffs, as the surviving legatees of the residue, are entitled thereto in equal shares, and that in the meantime, and until any child of the said Peter Shawe, lawfully begotten, shall be born, the plaintiffs are entitled to have the dividends, interest, and produce of the said residue, paid and applied to and for their use and benefit, and that as soon as it can be ascertained that there can be no person entitled to the said residue as a male child of Peter Shawe, lawfully begotten, the whole of the said residue, and the accumulations thereof may be paid to them.—[His Lordship here stated the terms of the gift, the events which had happened, and the section of the *Thellusson Act* affecting the question in the cause, and proceeded]—The gift to the daughters of Lewis Macpherson is made a contingent executory bequest, and that may be defeated by the birth of a son of Peter Shawe, if he should live to attain the age of twenty-one years. It is a right vested in them on

the testator's death, so as to be transmissible to their representatives, and that right is only prevented from being an absolute interest by the possibility of a son of Peter Shawe coming into *esse*, but it is only with reference to this possibility, that the direction to accumulate in this case is implied. If this possibility were not regarded, there would not be any accumulation or a direction to accumulate, and the daughters of Lewis Macpherson would be entitled to the immediate income; and it is argued, that the direction being made void by the statute, the law gives the enjoyment to the legatees, whose right is vested, though that right is subject to be divested by subsequent events, and with this the statute concurs, as giving the income to the persons who would have been entitled to it, if there had been no accumulation directed. It is true, if there be a gift of a legacy for life, with a contingent executory bequest over, the contingent gift over is held to vest in right, though not in possession: it is true, where there is an intermediate gift of a legacy with a gift over, if the legatee died under twenty-one, the first legatee taking an immediate vested interest, though subject to be divested, is held to be entitled to the income until the event shall take place; but in this case, it is only upon the failure of male children of Peter Shawe, that anything is given to the daughters of Lewis Macpherson: until that event happens, they can take nothing in possession, though they may have a vested right to a contingent interest, and that vested right be transmissible to their representatives. In the present state of things, nothing is given for immediate enjoyment. The income of the residue and its lawful accumulation is not given by the will at all, if it be not given by the residuary clause; and if it be given by the residuary clause, it is made void by the statute, and has become a portion of the residue undisposed of by the will; and under these circumstances, it appears to me, that the income of the residue and accumulation being made void by the statute, it belongs to the next-of-kin. There will be no difficulty about the minutes (1).

(1) But see the same case, *post*.

M.R. }
 Feb. 28; } FISHER v. FISHER.
 April 6. }

*Will—Real and Personal Assets—Exoner-
 ation—Lapse.*

A testator devised his real estates to six legatees, and he declared his freehold estates should be the primary fund, and his leasehold estates the secondary fund, for the payment of his debts, and he bequeathed his personal estate to A, exonerated from his debts. One of the devisees died in the testator's lifetime, whereby his share lapsed :—Held, that as between the heir-at-law, the next-of-kin, and the residuary devisees and legatee, the lapsed share of the real and personal estate ought to be applied in the same order as if the legatee had survived.

The object of this suit was to have a declaration of the rights of the parties interested under the will of the testator, Robert Fisher; and the principal question in the cause was, in what order the assets of the testator were to be applied in payment of his debts. The will was dated the 13th day of January 1824; and thereby the testator, after giving certain annuities to three grand-daughters, devised his messuages, lands, tenements, and hereditaments wherein he had any estate of inheritance as of freehold, and whether freehold, customary freehold, or copyhold, as to six undivided seventh parts thereof, to the use of his children Jabez, Robert, Joseph, Roger, Samuel, and Elizabeth, as tenants in common in fee, and as to the remaining seventh part thereof, to the use of his daughter Elizabeth, in trust for his son Josiah, for life, and after his death to herself. The testator then empowered his executors, notwithstanding the preceding devise, to sell so much of his freehold, customary freehold, and copyhold messuages, lands, tenements, and hereditaments, as they should deem sufficient, to be sold for payment, not only of the costs of the sale, but also for his just debts, and funeral and testamentary charges and expenses; and he directed the money so received should be applied in payment of such debts, funeral and testamentary charges and expenses accordingly; and he directed, that so much

of the money as should not be wanted for payment of his debts, funeral and testamentary expenses, and the costs of sale, should go and belong to, and be divided among the persons, and in the manner and for the respective interests, to and among whom, and in and for which his freehold, customary freehold, and copyhold hereditaments not sold as aforesaid, should go, accrue, belong, and be divided under the preceding devise and limitations. The testator then gave his leasehold estates and all his interest therein as to six seventh parts thereof to his children, Jabez, Robert, Joseph, Roger, Samuel, and Elizabeth, in equal shares as tenants in common, and as to the remaining seventh part thereof, to Elizabeth, subject to a trust for Josiah during his life. The testator then gave to his daughter Elizabeth, absolutely, all his ready money, securities, goods, chattels, rights, credits, and personal estate, (except his leasehold messuages, chambers, lands, and tenements,) freed, exonerated, and discharged of and from his debts, and funeral and testamentary expenses; and he afterwards expressed himself as follows: "I do hereby subject and charge my freehold, customary freehold, and copyhold messuages, lands, tenements, and hereditaments, as the primary fund, to and with the payment of my just debts, and funeral and testamentary expenses; and I declare, that my said leasehold messuages, lands, tenements, and chambers, shall be the secondary or auxiliary fund, for the payment of my debts, and funeral and testamentary expenses." The testator's son Jabez having died, he made a codicil, dated the 4th of August 1830, and thereby gave to his daughter Elizabeth, the share of his property which Jabez, if he had lived, would have been entitled to. The son Joseph died in January 1835. The testator died in the month of June next following, without having made any further alteration in his will. The consequence was, that the share of his property given to Joseph lapsed, and his share of the freeholds and copyholds descended to the testator's heir-at-law, or customary heir, and his share of the leasehold to the testator's next-of-kin.

The case was argued by—

Mr. Pemberton, and Mr. G. L. Russell,
 for the plaintiffs; and by—

Mr. Bethell, Mr. L. Lowndes, Mr. Koe, and Mr. H. E. Sharpe, for other parties.

It was argued for the plaintiff and others of the devisees under the will, that the lapsed share of Joseph was the fund first applicable to the payment of the testator's debts; that the law exempted the devisees and legatees, who were objects of the testator's bounty, at the charge of the heirs and next-of-kin, who were not objects of his bounty, and that the lapsed share must exonerate the shares effectually given. It was contended by those who were interested in the lapsed personal estate, that the descended real estate was charged with and applicable to the payment of debts, and the parties interested in the descended real estate insisted that the lapsed share of the leaseholds should be first applied. On the other hand, it was contended, that the freeholds, customary freeholds, and copyholds, ought to be applied in payment of the debts and funeral and testamentary expenses; that no part of the leasehold ought to be so applied, if the freehold and copyhold be sufficient; and that nothing had lapsed but the share of the surplus of real estate, or of the leaseholds which might remain after payment of the debts, funeral and testamentary expenses.

The cases relied on were :—

- Galton v. Hancock*, 2 Atk. 424, 427, 430.
- Barnwell v. Lord Cawdor*, 3 Mad. 453.
- Donne v. Lewis*, 2 Bro. C.C. 257.
- Milnes v. Slater*, 8 Ves. 293.
- Williams v. Chitty*, 3 Ves. 545.
- Hale v. Cox*, 3 Bro. C.C. 322.
- Waring v. Ward*, 5 Ves. 670.
- Manning v. Spooner*, 3 Ves. 114.

The MASTER OF THE ROLLS took time to consider the authorities.

April 6.—The MASTER OF THE ROLLS, after stating the circumstances of the case. — Upon the construction of this will, in which the testator has expressly exonerated his personal estate, other than the leasehold lands and tenements, from the payment of his debts, and expressly subjected his freehold, customary freehold, and copyhold estates as the primary fund

for the payment of the debts, and in which he has declared his leasehold estate shall be the secondary or auxiliary fund for the payment of his debts, funeral and testamentary expenses, I think the testator must be considered to have appropriated, first, his freehold, customary freehold, and copyhold estates, and, secondly, his leasehold estates, as a special fund for the payment of his debts, funeral and testamentary expenses. It appears to me, that Joseph, if he had lived, would only have been entitled to his share of so much of the freehold, customary freehold, and copyhold estates as remained after payment of the funeral and testamentary expenses, and debts, or in the event of the whole being insufficient for that purpose, to his share of so much of the leasehold estates as remained after payment of that part of the debts, and funeral and testamentary expenses, which remained unsatisfied, after the application of the primary fund; and I think, that nothing has lapsed but the share of the respective estates, which Joseph would have been entitled to, if he had lived. I am, therefore, of opinion, the debts, funeral and testamentary expenses, are primarily charged upon, and ought to be borne by, the freehold, customary freehold, and copyhold estates, and that if such estates be more than sufficient for the payment of the debts, funeral and testamentary expenses, one seventh part thereof, in consequence of the death of Joseph in the lifetime of the testator, is undisposed of by the will, and has descended to the testator's heir-at-law, and customary or copyhold heir; and that if the freehold, customary freehold, and copyhold estates be insufficient for the payment of the debts, funeral and testamentary expenses, the deficiency is to be raised out of the testator's leasehold estate, and that one seventh part of the leasehold estate, or of the surplus thereof, after payment of such deficiency, has lapsed, in consequence of the death of Joseph in the lifetime of the testator, and is undisposed of by the will. I believe there is no other point in this case, and the directions will be of course.

M.R. }
 Mar. 5; } CHERRY v. BOULTBEE.
 April 6. }

Legacy—Bankruptcy—Set-off.

In November 1821, A. became bankrupt, being indebted to B. In December 1821, B. made her will, by which she bequeathed to her executors, a legacy, in trust, to pay the income to A. for life, without power of assigning or anticipating it, with remainder as he should appoint. B. died in 1823, A. being still an uncertificated bankrupt, and the debt due to A. still remaining unpaid:—Held, that her executors were not entitled as against A's assignees, to set off the debt of A. against his legacy.

The testatrix, Catherine F. Boulton, by her will, dated in December 1821, gave to her executors two sums, of 2,000*l.* and 500*l.*, in trust to invest, and to pay the income half yearly into the proper hands of Thomas Boulton, and obtain his receipt for the same, without the same being liable to be assigned or charged by the said Thomas Boulton by anticipation, it being her mind and will, that the said Thomas Boulton should not have any power at any time to charge in anticipation, or assign the said half-yearly payments to any person or persons, and that the same should not be in any manner liable or subject to his debts, contracts, or engagements;" and from and after the decease of the said Thomas Boulton, upon trust to pay the principal monies to such person as Thomas Boulton should by deed or will appoint, or in default, unto the executors of the said Thomas Boulton, for his and their use and benefit. The testatrix died in 1823.

It appeared, that prior to the date of the will, and in November 1821, a commission of bankrupt had issued against Thomas Boulton, under which he had never obtained his certificate, and the plaintiff was his assignee, and he, the legatee, died in December 1833. At the time of his bankruptcy, Thomas Boulton was indebted to the testatrix in 3,000*l.* and 1,878*l.*, secured by mortgage of an estate, which was dated in January 1813. This debt had not been proved under the commission, and had never been paid, and was considered by the executors of the testatrix as irrecoverable.

This bill was filed by the assignee of Thomas Boulton, against the executors of the testatrix, claiming to be entitled to the legacies of 2,000*l.* and 500*l.*, and for an account of the estate of the testator.

The defendants insisted, that they were entitled to set off the debt due from the legatee to the testatrix against his legacy.

Mr. Pemberton and Mr. Cole, for the plaintiff.—This is a gift to one with a power of appointment, and is tantamount to an absolute gift; the assignee may execute the power for the benefit of the creditors. The testatrix, in this case, knew that the legatee was an uncertificated bankrupt; and her object, no doubt, was, to give him the legacy in such a way as to secure it from his creditors; it is clear, she had not any set-off in contemplation; but she has done this in such a way as not to exclude the creditors. How could there be a set-off if the legatee could appoint to a stranger? Suppose the bankrupt had obtained his certificate before the death of the testatrix, could there have been a set-off? There is no mutual debt to set off; the debt is that of the bankrupt, the legacy belongs to the assignee. It is said, that it is not equitable to come for payment of the legacy, without first paying the debt; but the plaintiff does not here assert an equitable right; his right is a legal right, which he might enforce in the Ecclesiastical Court.

Mr. Kindersley, Mr. L. Lowndes, Mr. Tinney, and Mr. George Turner, contra, argued, that if Thomas Boulton had not become a bankrupt, he could not have been entitled to receive anything under the will of the testatrix, until his debt to the estate had been paid; and in the same way his assignees, who claimed under him, had no better right.

Ex parte Blagden, 2 Rose, 249.

Jeffs v. Wood, 2 P. Wms. 128.

Rankin v. Barnard, 5 Mad. 32.

Ex parte Man, Mont. & M. 210.

Kirkpatrick v. Capel, 1 Sug. Pow. 79.

Wallis v. Taylor, Williams on Executors, 832, 2nd edit.

April 6.—THE MASTER OF THE ROLLS.
 —The question is, whether the defendants, the executors, have a right to set off the legacies given to Thomas Boulton against

the debt due from him to the testatrix at the time of his bankruptcy, and, I think, they have not. The debt being due to her, she had a right to prove it under the commission and against his estate; she had no claim against him, but being desirous of making a provision, she made this bequest, and her intention was, no doubt, to protect him from his creditors; but his right became vested in his assignees, and the assignees alone became entitled to claim it; and as it was never vested in Thomas Boulton, I think the executors have no right of set-off. This result is contrary to that of Sir John Leach, in *Ex parte Man*; and if there were no special circumstances in this case, I fear the two decisions would appear to be inconsistent with each other.

M.R. }
Feb. 28. } TAYLOR v. DAVIS.

Costs—Practice—Injunction—Partners.

On an interlocutory application, an injunction was granted, which determined the principal subject of dispute between the parties. The Court held, that the plaintiff was not justified in afterwards proceeding in the cause for the costs only, and gave him no costs subsequent to that time.

An injunction, restraining one partner from the exclusive use of the partnership books, continued at the hearing, although the partnership had then become dissolved by effluxion of time.

This case will be found reported in 4 Law J. Rep. (n.s.) Chanc. p. 18, on an application for an injunction to restrain the defendant from keeping a partnership book, called the Alphabet, from the counting-house of the firm. In consequence of that injunction, the book was returned, and the partnership expired on the 25th of December 1834.

The chief object of the plaintiff's bill being thus attained, his solicitor proposed to the defendant to dismiss the bill *with costs*, but the defendant rejected the offer; consenting, however, that the bill should be dismissed, and that each party should pay his own costs. The plaintiff declined acceding to these terms, compelled an answer from the defendant, went into evi-

dence, and now brought the cause to a hearing.

Mr. Pemberton and Mr. Wilcox, for the plaintiff, asked, that the injunction might be continued, and that the defendant might pay the costs of the suit.

Mr. G. Richards, contra, contended, that the plaintiff having, by the injunction, obtained the whole relief sought by the bill, was not justified in bringing the cause to a hearing, especially as no costs had been given on the application for an injunction;—that as the partnership had ceased, no relief could now be given in the suit.

Mr. Pemberton, in reply, said, that no costs had been given on the application for an injunction, not for want of merits, but because no application had been made for them, as they usually followed the result of the cause.

THE MASTER OF THE ROLLS.—This suit appears to me to have been properly instituted; the defendant having acted in a way which cannot be justified; and the plaintiff was right in filing his bill for the relief which he asked. An injunction was granted, and, it appears, that the parties afterwards came to an agreement as to the custody of the book called the Alphabet: there was no longer any dispute, except as to the costs. I think the plaintiff was right, and the defendant wrong up to that time—namely, to January 1835. At that time the only question was as to the costs of the suit: the defendant was willing that the bill should be dismissed, if the plaintiff paid his own costs: the plaintiff demanded his costs; and in that state of things, and to that time, the plaintiff was right: and, if matters had then come before the Court, the plaintiff would have been declared entitled to costs; but subsequently to that time, both parties were in the wrong. I think the defendant must pay the whole costs up to that time. The plaintiff might have applied to the Court to stay proceedings, for when parties come to an agreement as to the real matters in dispute, I cannot think it right to proceed in the cause, and to go into evidence, and come to a hearing, merely for the previous costs, which may be small. The plaintiff is entitled to costs to January 1835, and, subse-

quently to that time no costs ought to be given to either side. On the question, whether any order is to be made, I think that the order is not immaterial: the partnership, it is true, has expired, but there has been no partition of the partnership property, and I therefore think, that the order for the injunction must be continued.

M.R.
Mar. 9, 13, 15. } SHALCROSS v. DIXON.

Trustee—Vendor and Purchaser—Application of Purchase Money—Lis pendens.

Where there is a general charge for the payment of debts, a purchaser is not, generally speaking, bound to see to the application of the purchase-money.

*A testator having charged his real estate with the payment of his debts, devised it, subject to his debts, to A, his executor and trustee, beneficially. A, being also possessed in his own right of another estate, which was then subject to a mortgage for 1,000*l.*, executed a mortgage of both estates for 3,000*l.* The mortgage recited the will of the testator, and expressed that part of the mortgage money was to be applied in redemption of the mortgage of the trustee's private estate, and A. covenanted to pay the 3,000*l.*:—Held, that the circumstances were not such as to render it incumbent on the mortgagee to see to the application of the part of the money which was not applied in liquidation of the mortgage on A.'s estate.*

*An executor mortgaged his testator's estate conjointly with his own for 3,000*l.*, of which 1,000*l.* was declared invalid as against the testator's estate. A creditors' suit was afterwards instituted, and the executor subsequently made a further charge on the same estates for 2,500*l.*, and which was declared invalid, as regarded the testator's estate:—Held, that the creditors had no equity to compel the mortgagee to obtain payment of his first mortgage wholly out of the executor's private estate, so as to exonerate the testator's estate for their benefit.*

Lis pendens is not notice of every equity which arises in the course of a suit.

Robert Hibbertson, by his will, dated in 1824, directed his debts to be paid out

of his personal estate, and in case of its being insufficient, he charged his real estates with the payment of the deficiency, and he devised his real estates to James Hibbertson and John Hibbertson upon certain trusts, but, as regarded his Church Street property, in trust, subject to certain legacies for James Hibbertson in fee.

The testator died in 1824, and his will was proved by James Hibbertson, the testator's heir-at-law. John Hibbertson, the co-trustee, died in 1825, leaving James Hibbertson him surviving.

The testator's estate consisted partly of the Church Street property, which he devised to James Hibbertson, as before stated; and it appeared that James Hibbertson had a property of his own, called the Maglow estate, which was subject to a mortgage for 1,000*l.* It was proved, "that in 1828, James Hibbertson's solicitor, Mr. Webster, attempted to borrow 3,000*l.* for James Hibbertson, as executor under the will of his uncle, Robert Hibbertson, for the purpose (as was stated) of enabling him to pay the debts and legacies under the said will, and he, James Hibbertson, told his solicitor that he wanted the money for that purpose." The defendants, Dixon and Carlton, who were mere trustees, agreed to lend that sum, by way of mortgage, on the Church Street and Maglow estates; and accordingly, by indentures of lease and release of the 1st of May 1828, made between Roberts, the mortgagor of the Maglow estate, of the first part, James Hibbertson of the second part, and the defendants, Dixon and Carlton, of the third part, after reciting the conveyance of the Church Street estate to the testator, and the will of the testator, and the charge for the payment of his debts, and the mortgage of the Maglow estate by James Hibbertson for the sum of 1,000*l.*, which was still owing; and further reciting, that James Hibbertson was desirous of paying off the 1,000*l.*, and that Dixon and Carlton had, upon the application and request of James Hibbertson, agreed to pay the sum of 1,000*l.* to Roberts, the mortgagee, in discharge of the mortgage, and to advance and lend to James Hibbertson the further sum of 2,000*l.*, making together 3,000*l.*; in consideration of 1,000*l.* paid by Dixon and Carlton to Roberts, and 2,000*l.*

paid to James Hibbertson, they conveyed the Church Street estate and the Maglow estate to Dixon and Carlton, on trust, for securing the 3,000*l.* James Hibbertson covenanted to pay this sum, and that his wife would levy a fine to bar her dower, and he executed to the mortgagees a bond, as a collateral security for the money advanced.

The testator's debts remaining unpaid, the plaintiffs, who were creditors, filed their bill in March 1829, for the administration of the estate, and to obtain payment; and in May 1829, James Hibbertson executed a further charge to the defendants, Dixon and Carlton, for 2,500*l.*

After the decree in the creditors' suit, and after proceedings in the Master's office, these mortgages were discovered by the plaintiffs in 1834; and they filed this supplemental bill to set aside the mortgages as fraudulent, on the ground, that the mortgage money had not been applied in payment of the debts of the testator, but had been applied by James Hibbertson to his own use; and that the defendants had taken their mortgage under such circumstances, and with such notice of the trusts of the will of the testator, as to impose on them the necessity of seeing to the proper application of the money advanced to the trustee on the security of the testator's estate.

The objection, as to the second mortgage for 2,500*l.*, was, that it was taken *pendente lite*.

Mr. Kindersley and *Mr. Lovat* for the plaintiffs.

Mr. Pemberton and *Duckworth*, for the defendants Dixon and Carlton.

Mr. Spence and *Mr. Piggott* for the *cestuis que trust*.

The following cases were cited—

Hardrick v. Mynd, 1 Anst. 109.

Watkins v. Cheek, 2 Sim. & Stu. 199.

Shaw v. Borrer, 1 Keen, 559; s. c. 5

Law J. Rep. (n.s.) Chanc. 364.

Speckman v. Timbrell, 8 Sim. 253; s. c.

6 Law J. Rep. (n.s.) Chanc. 147.

Braithwaite v. Britain, 1 Keen, 206.

Scott v. Tyler, Dick. 712.

M'Leod v. Drummond, 17 Ves. 152.

Johnson v. Kennett, 6 Sim. 384; s. c. 3 M. & K. 624.

The MASTER OF THE ROLLS—(after stating the objects of the bill).—It seems that the testator died in 1824, having made his will, whereby he charged his real estate with the payment of his debts in aid of his personal estate. The real estate was charged with what was necessary to supply the deficiency of his personal estate. James Hibbertson became the sole executor, and the sole trustee of the estates charged, and he was beneficially entitled to the estate in question, but subject to these charges. The personal estate was considerably insufficient for the payment of the testator's debts; it was therefore necessary to obtain the means of payment out of his real estate. Now, the principal transaction, which is here in question, took place in 1828. A portion of the testator's estate was situate in Church Street; this was a portion of the estate charged in the manner mentioned. It appears that James Hibbertson, the trustee and executor, was entitled to the Maglow estate, which was his own, and was free from any trust; but it had been charged with a mortgage for 1,000*l.*, which at this time was due on it. Messrs. Dixon & Carlton were applied to, to advance money to James Hibbertson; and the agent, who applied to the agent of Messrs. Dixon & Carlton, stated, that the 3,000*l.* was wanted for the payment of the debts of the testator; they stated they wanted to pay off the mortgage on the Maglow estate, and the rest for the payment of the debts of the testator.

The defendants, Dixon and Carlton, with a view to see whether the security was sufficient, caused the Maglow estate to be valued at 4,276*l.*, and James Hibbertson agreed to include both the Maglow estate and the Church Street property. I think it must be admitted that the transaction was not conducted with all the prudence required; the two estates were joined together, and the security was not in the form of a mortgage, and did not make a distinction between the sums received, but was in the form of a deed of trust with power of sale in default of payment. The creditors of the testator, their debts not being satisfied, filed the original bill in March 1829, and, in the following month, an additional charge was made on the Maglow estate and Church Street pro-

perty for 2,500*l.*, which is one of the transactions impeached by this bill.

On the 23rd of July 1830, a decree was made in the creditors' suit, and on the 26th of March 1832, the Master made his report, by which he found, that James Hibbertson had received 1,551*l.* on account of the personal estate, and that he had made payments to the amount of about 4,114*l.*, leaving a balance of 2,562*l.* due to him.

In July 1832, the decree on further directions was pronounced, which directed a sale of the property, and which was afterwards put up for sale. It appears, that James Hibbertson, instead of stating by his answer what he had done as to the Church Street estate, and receiving the directions of the Court, suppressed the fact in his answer; but it being discovered in the Master's office, that this transaction had taken place, the present bill was filed to have it declared that these charges were fraudulent and void. Now, the general rule is subject to no doubt, that where there is a general charge for the payment of debts, the purchaser, generally speaking, is not bound to see to the application of the purchase-money; he is in no way bound to see to the application of the money, or what use the trustee may make of it: it is sufficient to place it in the hands of the trustee, free from appropriation, and subject to a proper application by the trustee; but if, in the course of the transaction, it appears, that the money is placed in the hands of a trustee, subject to an improper application, as for the private debt of the trustee, the purchaser is then bound to see the money properly applied, because he is aiding and assisting the trustee in committing a breach of trust. This being the rule, the question in all cases is, is the transaction of such a nature as to impose upon the purchaser the necessity of seeing to the application of the purchase-money? It is, therefore, necessary to see to this transaction again.

It appears, that so far from the defendants knowing that there was a breach of trust contemplated, they were informed, that all the money, except what was to be applied in discharge of the mortgage on the Maglow estate, was to be applied in payment of the debts of the testator. 1,000*l.* was clearly applicable to the mortgage, and

a portion was to be applied in satisfaction of interest on the sum of 1,000*l.*; therefore, I do not think I can consider it clear that the 2,000*l.* in the whole was to be advanced for the payment of debts: the security offered for that which was to be applied in payment of debts, that is to say, the real security, was the Church Street property, and the equity of redemption of the Maglow estate: in other words, the equity of redemption of the Maglow estate was made applicable to the payment of the debts of the testator. Though these things were imprudently mixed, I do not think they amount to a knowledge of a breach of trust about to be committed by James Hibbertson, who was owner of the Maglow estate, subject to the mortgage, and to the Church Street property, subject to the charge for payment of debts—considering that he was the person charged, and that it did not appear that a breach of trust was in contemplation, or of which the defendants had notice, I think that the defendants were not bound to see to the application of so much of the 3,000*l.* as was not applied in satisfaction of the mortgage.

His Lordship also held the second charge of 2,500*l.* invalid, being made *pendente lite*.

March 15.—This case again came before the Court on a point reserved. The first mortgage for 3,000*l.*, which was charged on the Maglow and Church Street estates, was declared valid to the extent of 2,000*l.* (1), as against the Church Street or testator's estate; and the second mortgage, which being taken *pendente lite*, was declared invalid as against the testator's estate, comprised not only the Church Street and Maglow estates, but also a third estate belonging to James Hibbertson, called the Scrimmes estate. These several estates were sold in round numbers for the sums following:—

The Maglow estate . . .	£2,500
The Church Street property .	1,670
The Scrimmes estate . . .	2,200

(1) This was not strictly the amount, but only to the extent to which that sum came unfettered to the hands of the executor. The sums stated are not strictly accurate, but were assumed during the argument.

The plaintiffs now contended, that the second mortgage being taken *pendente lite*, ought not to be allowed to interfere with their equities, in regard to the first mortgage; and as respected this mortgage, the defendants having a charge on the two estates, while the plaintiffs had a charge on one only, the first mortgage ought to be paid out of the Maglow estate to the full extent of its value, so as to exonerate the Church Street property, for the benefit of the plaintiffs; the result would be, that 2,500*l.*, the produce of the Maglow estate, and 500*l.*, part of the produce of the Church Street estate, would be applied in discharge of the said mortgage of 3,000*l.*, leaving a surplus of 1,100*l.* out of the Church Street estate for the benefit of the plaintiffs; by this mode 2,200*l.* only, being the produce of the Scrimmes estate, would then remain for the payment of the second mortgage of 2,500*l.*, which was not a valid charge on the Church Street property.

For the defendants, it was contended, that upon the frame of this record, no adjudication could now be made on this point; and further, it was insisted that the doctrine of *lis pendens* could only apply to the matters actually put in issue by the bill; that, as the defendants had the legal estate, and the plaintiff a mere equity, (if any,) the plaintiffs had no right to an exoneration of the Church Street estate at the expense of the defendants, and that the whole or a sufficient part of the produce of the Church Street estate should be first applied in payment of the first mortgage, whereby such a portion of the produce of the Maglow estate would remain, as, together with the purchase-money of the Scrimmes estate, would fully liquidate the defendant's second mortgage of 2,500*l.*

The point was argued by the same counsel.

THE MASTER OF THE ROLLS.—The question is, as to the right of the creditors to be exonerated out of the Maglow estate. I never heard the doctrine of *lis pendens* carried to the extent contended for by the plaintiffs,—that it is to be notice, not only of what is charged in the bill, but is to be considered notice of any equity, which by possibility can arise out of the matters in ques-

tion in the suit, even if inconsistent with the relief prayed. Besides, the relief here prayed is, that the deeds may be declared fraudulent and void; there is no alternative prayer. After the first mortgage, Dixon and Carlton, without notice, advanced other sums to Hibbertson, on the security of the Maglow, Scrimmes, and Church Street estates; as to the latter property, I considered the charge invalid, there being a *lis pendens*; but I cannot say that *lis pendens* is notice of any equity which can arise in the course of a cause, and I think there is no such equity as contended for by the plaintiffs; the effect would be this, that there having been certain sums of about 2,000*l.* advanced for the payment of the testator's debts, and this sum not being duly applied, as it is conjectured,—for it has not been proved,—the creditors have, as against an incumbrancer of the private estates of the person who made the mortgage, an equity to be exonerated out of those estates. There being charges, amounting together to 5,500*l.* made to the defendants Dixon and Carlton, in respect of which 2,500*l.* and 1,000*l.* are not duly charged on the Church Street estate, there have arisen from the Maglow and Scrimmes estates 4,700*l.*, leaving 800*l.* of the amount of mortgages unpaid, and which is less than that which was advanced on the security of the Church Street estate for the payment of the debts of the testator. Messrs. Dixon & Carlton have, I think, a right to have this paid out of the 1,670*l.*, the produce of the Church Street estate.

M. R. }
March 2; } BAWTREE v. WATSON.
April 6. }

Solicitor and Client—Costs.

The lien of solicitors cannot interfere with the equities between the parties.

On taking the accounts between the plaintiff and the defendant, a sum was found due from the plaintiff to the defendant, but the defendant was ordered to pay costs. The solicitor of the defendant claimed a lien for his costs, on the balance found due from the plaintiff, without reference to the costs payable to the plaintiff:—Held, that the plain-

tiff's right of set-off for the costs had priority over the lien of the defendant's solicitor.

The plaintiff being entitled to set off costs which were payable to him by the defendant, against a sum found due from him to the defendant, lodged a detainer against the defendant when in prison:—Held, that the plaintiff's right of set-off was not affected thereby.

In the year 1831, the plaintiff filed his bill in this court, to set aside certain conveyances and surrenders of a reversionary copyhold estate, which he had made to the defendant, and for an account of the rents and profits. In this suit, the petitioner, Mr. Cox, was retained for the defendant, and on the 22nd of April 1834, and before the hearing of the cause, the defendant being indebted to his solicitor in a sum of 450*l.*, executed a deed of covenant to surrender the copyhold property, for securing the sum of 450*l.* Afterwards, on the 25th of April 1834, a decree was made, whereby it was declared, that the sale of the reversionary interest of the plaintiff, and the assignment of the personal property in the pleadings mentioned to the defendant, had been obtained by fraud; and it was declared, that the same should be set aside, and stand as a security for what, if anything, might appear to be due from the plaintiff to the defendant, and an account was directed to be taken of the dealings and transactions between the plaintiff and defendant; and it was declared, that on payment of what should be found due to the defendant, he should reconvey the property. The defendant was ordered to pay the costs of the plaintiff up to the hearing, and the Court reserved subsequent costs.

In August 1834, the Master certified the plaintiff's costs amounted to the sum of 324*l.* 8*s.* 2*d.*; and, pending the other proceedings before the Master, and before the accounts had been completed, the defendant was arrested for debt, and having surrendered to the King's Bench prison, an attachment was lodged with the marshal of the prison by the plaintiff against the defendant, for the amount of the costs. The defendant was afterwards discharged under the Insolvent Debtors Act, and included the costs due to the plaintiff, and the debt due to the petitioner in his schedule.

By his report, dated December 1836, the Master charged the defendant with the sum of 2,509*l.* 19*s.*, which did not include the costs, amounting to 324*l.* 8*s.* 2*d.*, and he charged the plaintiff with a sum of 2,964*l.* 1*s.* 9½*d.*, leaving a balance due from the plaintiff to the defendant, of 454*l.* 2*s.* 9½*d.*

On further directions, in July 1837, it was declared, that the sum of 324*l.*, the amount of the plaintiff's taxed costs, should be added to the sum of 2,509*l.* 19*s.*, due from the defendant to the plaintiff, and an account was directed to be taken of the rents and profits received by the defendant of the estate in question, which the Master afterwards found amounted to 299*l.*, and this sum and the amount of the costs being deducted from the amount found due from the plaintiff to the defendant, left a balance of 169*l.* 5*s.* 4½*d.* due from the defendant to the plaintiff. The Master's report was confirmed, and the subsequent costs of the defendant were ordered to be added to the amount found due to the plaintiff, and the provisional assignee of the defendant was ordered to convey the estate, and his costs were to be paid by the plaintiff, and added to his debt.

In the progress of the suit, the defendant, for securing the 420*l.*, had also delivered to the petitioner, his solicitor, various deeds and documents relating to the copyhold estate in question. The petitioner, by his petition, prayed, that he might be declared to have a lien on the copyhold estate, by virtue of the deed of April 1834, and the deposit of the other deeds, and that, if necessary, an account might be taken of what was due to the petitioner, and that the provisional assignee and the defendant might be restrained from surrendering the estate to the plaintiff, until the petitioner had been paid.

Mr. Pemberton and Mr. W. C. L. Keene, in support of the petition.

Mr. Hayter, contra.

Mr. Reynolds, for the assignee of Watson.

For the petitioner it was contended, that he had a lien for his costs upon the balance of 454*l.*, originally found due to the defendant by the Master's report, or at least upon the balance ultimately found due to the defendant, before deducting from such balance the plaintiff's costs. It was also

contended, that if the plaintiff's right of setting off the costs had originally a priority over the lien of the defendant's solicitor, yet that by lodging the detainer against the defendant, the plaintiff had elected to take satisfaction against the person of his debtor, and had thereby waived his right of set-off. The petitioner also relied on his deed of covenant.

On the other hand it was contended, that the solicitor's lien extended only to the balance ultimately found due to the defendant, and could not interfere with the plaintiff's right of equitable set-off, for the costs due to him from the defendant;—that the account of December 1836 was incomplete; and that, therefore, no such balance as 454*l.* really existed at that time. As to the deed of covenant, it could not affect the question, being executed *pendente lite*.

The following cases were cited:—

Doe dem. Swinton v. Sinclair, 5 Dowl. P.C. 26.

Jones v. Turnbull, *ibid.* 591.

Howell v. Harding, 8 Taunt. 362.

Harmer v. Harris, 1 Russ. 155.

Mar. 2.—The MASTER OF THE ROLLS.—The principal question is, whether the lien of the solicitor is to enter into conflict with

the equities between the parties, or whether, in a case where costs have been awarded to the plaintiff, and a debt found due from him, he could on further directions be allowed to set off the costs, without regard to the lien of the solicitor. Another point was, whether the deed of covenant of April 1834, could affect the rights of the parties; and I am of opinion, that the deed cannot affect the rights of the plaintiff in this cause. There was also this question arising out of the attachment, whether the party having thought fit to follow a personal remedy, is entitled to resort to his lien. His Lordship said, he would give the points his further consideration.

April 6.—The MASTER OF THE ROLLS (after stating the circumstances of the case and the points argued,) said—that on looking at the cases, it did not appear that the Court allowed the solicitor's lien to interfere with the equities between the parties, and that the plaintiff was, therefore, entitled to the set-off, if his right had not been prejudiced by lodging the attachment; and it appeared to him, that this circumstance did not deprive a party of any lien or right of set-off; and he was, therefore, of opinion, that this petition must be dismissed, with costs.

Petition dismissed.

END OF HILARY TERM, 1838.

CASES ARGUED AND DETERMINED

IN THE

Court of Chancery.

EASTER TERM, 1 VICTORIA.

M.R. } DAVIDSON v. THE MARCHIONESS
April 28. } OF HASTINGS.

Practice.—Sequestration.

Personal service in Scotland of the order nisi for a sequestration, is good service whereon to found the order for a sequestration.

The defendant having privilege of peerage was served with process in England, and the usual order *nisi* for a sequestration was made, that is, that a sequestration should issue, unless the defendant, upon personal service of the order, should shew cause to the contrary. The order *nisi* was served in Scotland, and the registrar entertaining doubts as to the regularity of the service—

Mr. Evans applied *ex parte* to the Master of the Rolls on the subject.

The MASTER OF THE ROLLS, after consulting the Registrar, said, he saw no objection to the service, and made the order absolute.

[See *post*, where the decision on argument was affirmed.]

M.R. }
May 10. } BALLARD v. CATLING.

Pauper—Costs.

A plaintiff, who had obtained an order to sue in formâ pauperis, held to be liable to pay dives costs, he not having served the order on the defendant.

Mr. W. C. L. Keene, on a former day, moved to dismiss the bill for want of prosecution.

Mr. Chitty, for the defendant, undertook to speed, and, as a defence against the costs, he stated, that the plaintiff had obtained an order to sue in *formâ pauperis*. It was then a question, whether this order had been served or not; the case stood over for inquiry, and it was afterwards found that it had not.

Mr. W. C. L. Keene, on this day, applied for the costs of the motion, on the ground that an order obtained *ex parte* was a nullity until served.

The MASTER OF THE ROLLS, on that ground, held that he was entitled.

M.R. }
April 19. } WHITFIELD v. PRICKETT.

Legacy—Bankruptcy—Forfeiture.

Bequest to legatee with a clause of forfeiture, in case he should mortgage, charge, sell, or expose to sale, assign, or incur.
The legatee became a bankrupt:—Held, no forfeiture.

A testator bequeathed 1,700*l.* long annuities to trustees, in trust to pay the interest to the testator's nephews and nieces, in certain proportions, during their natural lives, with benefit of survivorship, and the will contained the following clause:—

"That the respective half-yearly payments of the said annuities should, from time to time, be made into the hands of his nephews and nieces respectively, and that their own respective receipts should be a discharge to his said trustees for the same; and that his said nephews and nieces should not have power to mortgage, charge, sell, or expose to sale, assign, or incur their respective portions of the said annuities, or any of the half-yearly payments thereof respectively, nor to direct the payment thereof to any other person, nor to give any receipt or discharge for the same, by anticipation, or before the payment, for which such receipt or discharge should be given, should have accrued due; and in case any or either of them, his said nephews or nieces should mortgage, charge, sell, or expose to sale, assign, or incur the annuity, share or other interest accruing to him, her, or them respectively, by virtue of his said will, or the trust therein declared, or any of the half-yearly payments thereof, or direct the payment to any other person, or give any receipt for the same by anticipation, before the payment for which such receipt was given should have accrued due, then the said testator directed, that the annuity, share, and interest thereinbefore given to, or in trust for such of them as shall not act contrary to the direction thereinbefore contained, should from thenceforth cease, and be no longer payable to him, her, or them; but that the same should thereupon and thenceforth be payable to his, her, or their child or children respectively, if any such there should then be, or to his nephews and nieces and

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their children, in such manner, shares, and proportions, as the same would then be payable or distributable, if the annuitant or annuitants respectively, so acting, were then dead, and he gave, bequeathed, and directed the same to be held in trust accordingly."

One of the children became bankrupt, and the question was, whether the subsequent dividends were payable to the assignees or to the other legatees.

Mr. Spence, for the assignees, applied to have the life interest paid to them. He cited *Lear v. Leggett* (1).

Mr. Lloyd, for the legatees, cited *Cooper v. Wyatt* (2).

Mr. Abraham, in the same interest.

The MASTER OF THE ROLLS held, that as the bankruptcy was an act of law, and not a voluntary assignment by the legatee, which alone was contemplated by the will, the assignees were entitled.

Note.—See *Tyner v. Jones*, 3 Law J. Rep. (N.S.) Chanc. 241.

L.C. }
April 20, 28. } *Ex parte GOREN in re BRETTELL.*

Bankruptcy — Jurisdiction of Court of Review.

The Court of Review has no jurisdiction to compel a specific performance by a purchaser of the bankrupt's estate. The proper course, in the case of an unwilling purchaser, is to permit the assignees to file a bill in equity.

This case came before the Lord Chancellor, on appeal, upon a special case from the Court of Review, which stated the bankruptcy of James Goren, and that John Sowerby Lewis Cubit, Julius Anderson, and Edward Edwards, were chosen assignees. That by an order of the Court of Review, made on the petition of two equitable mortgagees of part of the bankrupt's estate, on the 25th of July 1834, it was declared, that the petitioners were equitable mortgagees of the said property, and a sale thereof was ordered in

(1) 2 Sim. 479; s. c. 1 R. & Myl. 690; 7 Law J. Rep. Chanc. 126.

(2) 5 Mad. 482.

the usual form, and that the produce should be applied in paying the petitioners. That the property was put up for sale by public auction, subject to certain printed conditions exhibited, and by which the said sale was stated to be "by order of the Court of Review in Bankruptcy;" and by the third of such conditions, it was provided that the purchaser should pay a deposit in the proportion of 15*l.* per cent. of the purchase-money into the hands of the auctioneer, and sign an agreement for payment of the remainder to the vendors on the 18th of October then next, *at the office of Messrs. Burgoyne & Thrupp, 160, Oxford Street*, the solicitors to the assignees, at which *time and place* the purchase was to be completed. That Mr. John Cutts was the highest bidder for, and declared the purchaser of the said manor, and he signed a written agreement. Mr. John Cutts not having completed his purchase, a petition was presented to the Court of Review by the equitable mortgagee, and the assignees, thereby praying that the said John Cutts might be ordered specifically to perform the said contract, &c. That the last-mentioned petition came on to be heard on the 30th of January 1838, in the said Court of Review, when, after hearing counsel for the petitioners, and the said John Cutts, and the said petition and affidavits filed in support of, and in opposition thereto, it was by the said Court ordered, that it should be referred to Francis Gregg, Esq., an officer of the same Court, to ascertain and state whether the petitioners could make a good title to the said manor; and if he should find that the petitioners could make a good title, then that he should state to the Court when it was first shewn that such good title could be made, and whether the said John Cutts was entitled to any compensation by way of abatement or deduction from or out of the said purchase-money, and on what ground or grounds, regard being had to the conditions of sale; and that if he should find that the said John Cutts was so entitled, then that he should ascertain and fix what ought to be the amount of such compensation or abatement; and that for better making the said inquiries, all necessary and proper parties should be examined before the said Francis Gregg,

upon interrogatories or otherwise, touching the matters in question, as the said Francis Gregg should think fit, and should severally produce before him upon oath, all books, papers, and writings in their custody or power relating thereto, as he should direct. And the Court reserved the consideration of all further directions on the matters of the same petition, and also the costs of all parties of and occasioned thereby, until after the said Francis Gregg should have made his certificate; and the said parties were to be at liberty to apply to the same Court, as they should be advised. That upon the hearing of the said last-mentioned petition, the counsel of the said John Cutts objected to the jurisdiction of the said Court of Review, and insisted, that even if the said Court had jurisdiction, the directions of the same order were contrary to law; and that the question was, whether the said Court of Review had power to make the said order of the 30th of January last.

Sir Charles Wetherell and Mr. Lee, for the appellant.—The Court of Review has no jurisdiction to make such an order as the one which they have made in this case; and nothing has been done to give that Court jurisdiction in this particular instance, if it does not exist generally. The deposit was to be paid to the auctioneers, not into court. The particulars of sale merely state that such sale was made under the order of the Court of Review in Bankruptcy, though it is said, that a commissioner of that court was present at the auction, which possibly will be argued, to have given efficacy to the Court's jurisdiction. The other side found their proposition upon this, that by the 2nd section of the act 1 & 2 Will. 4. c. 56, the Court of Review was to exercise the jurisdiction theretofore exercised by the Lord Chancellor, as the superior Judge in Bankruptcy; and the question then is, whether the Lord Chancellor himself had, under the bankruptcy statutes, or any usage or construction upon those statutes, put by successive Chancellors from the time of Elizabeth downwards, any such jurisdiction. The main jurisdiction of the Lord Chancellor in Bankruptcy, was founded upon the statutes 34 & 35 Hen. 8. c. 4, and the 13 Eliz. c. 7. By the 13 Eliz.,

the only power conferred upon the Lord Chancellor, was to name commissioners to sell the bankrupt's property. Lord Hardwicke and others were of opinion, that, according to the true construction of that statute, the Lord Chancellor had no power to hear an appeal from his own commissioner. However, that jurisdiction (it is not known exactly when) did undoubtedly become well established, and was called the Chancellor's jurisdiction in bankruptcy. There is, however, clearly nothing in the statute of Elizabeth, either by express words or necessary implication, to give the Lord Chancellor that jurisdiction in bankruptcy, which he has *separately*, as the head of a court of equity; and, that of specific performance which is sought here on petition, is the strongest exemplification of the powers of a court of equity. If, therefore, the statute does not give to the Chancellor sitting in bankruptcy, a general jurisdiction as a court of equity, could it have been otherwise acquired by him? It is an undoubted position of the law of England, that nothing but prescription or statute can make a court of equity. The King, by letters patent, cannot make one—see Lord Coke's *4th Inst.* 'Treatise on the Court of Chancery,' 78, and third resolution in *Derby's case* (1). If, therefore, it should be said that Chancellors have assumed the jurisdiction, (which fact must be presently examined,) their own usurpation would not have constituted it a legal court. But it is necessary to see whether the Court has *de facto* rightly or wrongly exercised this jurisdiction, which is important, because the words of the statute creating the Court of Review are, that the new Court was to exercise all such powers as "now usually are or lawfully may be exercised by the Chancellor." There is no vestige of any Chancellor in his ministerial capacity, administering the bankrupt laws, in case of a sale by assignees, and an objection to the title by the purchaser, assuming the power to make such an order as the Court of Review has made in this case. In *Ex parte Comings* (2), on an application that the sale of a bankrupt's estate might be made by auction in the country,

Lord Thurlow said, "The Court does not give directions about the mode of selling the estate, but leaves that to the commissioners, who will sell in the manner they think most advantageous. *It is not like the sale of an estate by the Master.*" *Ex parte Bennett* (3) is also a most important case. There, General Harris was anxious to be amenable to the jurisdiction; and even if he had resisted it, inasmuch as he had purchased by an agent, clearly under the authority of the Court in Bankruptcy, he might have been said to have brought himself by such means within the jurisdiction of that Court; and the Lord Chancellor might have been justified in doing what Lord Eldon called "putting out a long arm," to bring him within that jurisdiction. But, even in that case, Lord Eldon refused to act, unless the matter were brought before him by bill in a court of equity. In *Jenkins v. Hiles* (4), Lord Eldon points out at large the advantages both to the vendor and purchaser, upon a bill for specific performance in a court of equity. Where is the special assurance of a good title so much boasted of in that case and elsewhere, as being obtained on a bill for specific performance, if Mr. Gregg, not a Master, nor anything like a Master, is to decide? In *Bromley v. Goodere* (5), a bill was directed to be filed, merely to compute interest on a debt; and the principle stated has been, that unless upon a *bill*, there could be no *appeal* from the Chancellor. The Court of Review, lately grown very bold, seem at one time to have been affrighted at the idea that they were a court of equity, for in *Ex parte Holder* (6), it was holden by a majority of the Judges, *Cross dissentiente*, "That a stranger to the commission having obtained an assignment of the creditors' proofs, and therewith bought part of the bankrupt's estate from the assignees, the Court had no jurisdiction to set aside the purchase." But then came the case of *Ex parte Sidebotham* (7), where "a specific performance was decreed under the cir-

(3) 10 Ves. 381.

(4) 6 Ves. 652.

(5) 1 Atk. 75.

(6) 1 Mont. & Ayr. 518; s. c. 3 Law J. Rep. (N.S.) Bankr. 78.

(7) Ibid. 655; s. c. 3 Dea. & Ch. 818; 3 Law J. Rep. (N.S.) Bankr. 122.

(1) 12 Coke, 114.

(2) 1 Ves. jun. 112.

cumstances." The circumstances there were, that the party had waived all objections—a very untenable ground for the order, but which it is not necessary to combat here: the purchaser has resisted *ab initio*. That case came on an appeal before the Lord Commissioners Shadwell and Bosanquet, and is reported under the name of *Ex parte Barrington* (8), and it was confirmed, but that decision of the Lords Commissioners carries the case no farther than that of the Court below, in point of actual decision. Lord Commissioner Shadwell did certainly lay down the rule as a general proposition, that the Court of Review had power to compel a specific performance, but the case did not call for his opinion on that general point. But then the other side will rely on Sir John Leach's decision of 1822, in a case of *Ex parte Gould* (9), but that case came on *ex parte*; the purchaser did not appear; there was no argument, and it cannot have the credit due to a deliberate decision. No such decision has ever been made, or ever asked for, as that in *Ex parte Gould*. The utter inability of even the Lord Chancellor, with his machinery, and the assistance of his own Masters, to get in a term by order, without a *bill* and *decree*, is a sufficient argument against the existence of the jurisdiction claimed by the Court of Review. The Lord Chancellor is liable to a prohibition, if he assumes an excess of delegated jurisdiction under a statute—see *Ex parte Cowan* (10), which is cited merely for the principle. If the Lord Chancellor is made a commissioner under an act of parliament, the mere fact of his being the head of a court of equity, does not confer on him one iota more of authority than the statute gives him. The case of *Ex parte Gould* is incorrect in this respect. Sir John Leach there ordered the purchaser to complete his purchase, without any reference as to title—*Sugd. Ven. and Pur.* 54, n. Sir John Cross's judgment in *Ex parte Sidebotham*, is founded upon an evident misconception of what fell from Lord Eldon in *Ex parte Bradley* (11). Lord Eldon's words are these: "I am convinced that it was the

intention of the legislature, in giving jurisdiction to the Chancellor in Bankruptcy, to give him power to use in Bankruptcy the authority used in Chancery, where no specific authority is given by the statutes. In this, Lord Hardwicke supports me." Lord Eldon merely meant the same thing that he did in *Ex parte Stephens* (12), viz. that the jurisdiction in Bankruptcy was both legal and equitable, and that he had the same powers in Bankruptcy, as in Chancery, of enforcing obedience to his orders properly made. It will be said, that the purchaser, by the act of purchasing, submits to the jurisdiction of the Court of Review, in analogy to sales before a Master in Chancery. But the doctrines of the Court of Chancery, on specific performance, are very peculiar. The sale is a judicial sale. It is taken out of the Statute of Frauds; nay, it is even binding against the representatives of the purchaser, who has not subscribed, that he was the best bidder, after confirmation of the Master's report—*The Attorney General v. Day* (13). Can the Court of Review do the acts described in *The Attorney General v. Day*? Can the Court of Review open biddings? In *Sugd. Ven. and Pur.* 59, 8th edit., it is said, "It seems to have been thought that the power of opening biddings might be extended to sales under a commission of bankruptcy—*Ex parte Partington* (14). This, however, has never been done; nor is there any reason to apprehend that so mischievous an extension of the rule will ever take place."

Mr. Wigram and Mr. Evans, contra.—The question here is a dry point of jurisdiction. It is not intended to claim for the Court of Review a general jurisdiction. But the authority of the Court is only required for this, that in *Ex parte Barrington* the Lords Commissioners were right to this extent, that there may be a *plain case* in which this jurisdiction may be exercised. By the terms of the special case, the Court must deal with this as a clear case, in which there is nothing to try as to title.

[THE LORD CHANCELLOR.—The affidavit accompanying the special case, states a long correspondence leading to no satis-

(8) 2 Mont. & Ayr. 245.

(9) 1 Glyn & Jam. 231.

(10) 3 B. & Ald. 123.

(11) 1 Rose, 202.

(12) 11 Ves. 26.

(13) 1 Ves. jun. 221.

(14) 1 Ball & Beat. 209.

factory conclusion: that shews that there must be some question.]

That shews only that the purchaser is dissatisfied, which he may be without any grounds. The question expressly put in issue by the special case is, had the Court of Review a right to make this reference? The Court of Review has certainly a right to direct assignees to file a bill or not, and on that ground this order is right; for the Court cannot in every case, whether complicated or not, blindly tell assignees to file a bill, without first satisfying itself, whether there is a probability or not of making a title.

[THE LORD CHANCELLOR.—But this order directs all parties to be examined upon interrogatories, and reserves the question of costs.]

That may be the formal conclusion of the order, and still the order may be right. When examination of title is completed, the Court may then decide what steps are to be taken. The right course for the purchaser to have taken was, to have suggested the difficulties in the title to the Court of Review, and not to have protested against their jurisdiction. The submission of the parties will confer a jurisdiction. In this case it is clear, from the particulars of sale, that the purchaser bought with full notice that he was subjecting himself to the jurisdiction of the Court of Review. These particulars are in the common form for sales in bankruptcy, and are universally understood.

[THE LORD CHANCELLOR.—I have looked through the agreement and conditions of sale, and find nothing to make this case differ from an ordinary sale by auction. The statement in the particulars would never lead a purchaser to think that he was entering into a contract to be enforced by the Court of Review. It has not been alleged before me, that there is such a settled practice, that all the world must know it. If there is, that will go a good way for your argument; but, in that case, the world must be wiser than I am. You must have either special condition, or generally understood practice.]

Then the question is, has the purchaser a vested interest in the delay of the Court of Chancery? Suppose a purchaser to have written to the assignees accepting the

title—the property to have been given up to him, and waste committed by him. Then suppose a petition to the Court of Review, stating these circumstances, and praying that the purchaser may perform his contract—would the purchaser be allowed to say, “I admit all these acts, but I have never submitted to the jurisdiction; it is not convenient to pay the money. I will therefore have a bill filed, and take advantage of two years’ delay in the Court of Chancery”? The whole design of the late Bankruptcy Act was to insure the speedy distribution of the estates of bankrupts,—section 1, preamble of act. *Ex parte Comings* does not touch this case: all that Lord Thurlow there decided was, that he would not give special directions. Every Judge has said, that the Court of Bankruptcy is a legal and equitable tribunal—*Bromley v. Goodere*, *Ex parte Barfit* (15). In *Ex parte Bradley*, Lord Eldon says, “The Court in bankruptcy has the same powers as in equity.” The Court of Review and the Court of Chancery stand precisely on the same footing. The only reason why the Court of Chancery cannot compel specific performance, by an order on petition, is, because the only mode by which it can bring a party before it, is by subpoena. The question is not as to the peculiar form of process, but—has the party brought himself within the jurisdiction? In sales before a Master, the Court of Chancery does not require a bill to be filed. The rule of the court is well known, and there is an analogy between this case and that of a sale before a Master. There is surely great respect due to the authority of the case before the Lords Commissioners, where all these points were much considered.

Sir C. Wetherell, in reply.—In a late case of *Lautour v. Holcombe* (16), Sir L. Shadwell asks, “What original jurisdiction has the Court of Bankruptcy, to interfere with a person who has never submitted to the jurisdiction?” It is curious, that, during three centuries, the argument of convenience should never have been raised. But even convenience cannot sanction an unauthorized and usurped jurisdiction.

(15) 12 Ves. 15.

(16) 8 Sim. 76; s. c. 5 Law J. Rep. (N.S.) Chanc. 323.

Title cannot be decided upon in this way ; there is no appeal unless the Judges of the Court of Review think fit to give leave.

[The LORD CHANCELLOR.—It is impossible to doubt, that in *Ex parte Barrington* the question was considered and decided. That case has been followed, as it naturally would be, by the Court of Review. Under these circumstances, I shall look carefully into the case ; I have a very strong impression upon it at this moment, but I must be quite sure that I am right.]

Ex parte Lund, 6 Ves. 782.

Anon. 14 Ves. 449.

In re the Earl of Litchfield, 1 Atk. 87.

Ex parte Rowton, 1 Rose, 15 ; s. c. 17 Ves. 426.

Ex parte Pease, 19 Ves. 46.
were cited.

April 28. — The LORD CHANCELLOR (after stating the case,) said—The first question made before me was, whether the Court of Review had any jurisdiction on the subject. And the second was, whether anything had passed to bind the parties to submit to its orders. I will consider the second point in the first place. This jurisdiction is assimilated to that of the Court of Chancery in sales before a Master. If the Court of Review has not of itself any such jurisdiction, it certainly might acquire one in a particular given case by the submission of the parties. But I find nothing here to shew that. The only thing pretended is, that the particulars state that the sale was made by the order of the Court of Review ; but any Court may order a sale, and it does not follow that the sale is by the Court. It appears to me, that the conditions of sale are so framed, as not only not to give the purchaser notice, but to remove from his mind any suspicion that he might have had, that by purchasing he would submit himself to the controul of the Court of Review. I confine myself to the third and last condition, which is enough : the tenor of that condition is quite different from the practice before the Master. Again, the agreement is signed, not in the manner of a sale before the Master, but by a person who describes himself as agent for vendors. There is nothing in the whole transaction borrowed from the practice of this

Court,—which is the only way in which the jurisdiction could have been exercised, supposing it to exist : there is absolutely nothing here to warn the public. In proceedings before the Master, there is no contract before the Master's report. Till the report is confirmed, anybody may open the biddings. In sales before the Master, the Statute of Frauds is excluded : can it be said that that is the case here ? In sales before a Master, there is no auction duty payable : is that so here ? *Ex parte Comings* is only valuable, as shewing what Lord Thurlow thought upon rights under sales before a Master. In the case of *Annesley v. Ashurst* (17), after a sale ordered by a decree, the trustees entered into a contract, and a bill was filed, praying a specific performance of that contract, but the Court refused to enforce it except upon the Master's report.

Throughout the case it has been considered that the Court of Review has jurisdiction to decree specific performance ; but it must be observed, that even in sales before the Master, although there is the same sort of equity administered, there is no "specific performance," for there is no contract. Without going further, I am clearly of opinion that nothing has been done in this case to give a jurisdiction.

Now, with respect to the other point : unfortunately a different view from mine has been taken, and although not necessary here, I must comment upon the practice which has arisen.

In the first place, the Court of Review has no jurisdiction whatsoever for this purpose under the act. I will shortly state the cases cited in support of the jurisdiction which they have assumed. I say assumed, without any fault of theirs, because they were bound to follow the decision of the Lords Commissioners.

But I will first observe that, prior to those cases, the Court has always repudiated any jurisdiction over strangers in bankruptcy—see *Ex parte Jackson* (18). In *Ex parte Pease*, Lord Eldon said, "I do not disturb what is well settled, that an assignee, under a commission of bankruptcy, cannot come here and call by pe-

(17) 3 P. Wms. 282.

(18) 5 Ves. 357.

tion on a person to appear here who claims nothing under the bankruptcy." In *Ex parte Crowe* (19) it was held, that the Court sitting in bankruptcy had no jurisdiction to order the personal representative of a deceased assignee to account for the personal estate of the bankrupt in his hands. There are cases which come nearer this. The first is *Ex parte Bennett*, and, in very modern times, before the institution of the Court of Review, the case of *Ex parte Holder* occurred. With these authorities it is surprising how the case can now come before me as it does. But the mischief can easily be traced. It has arisen from two cases, perhaps from one only, but at most from but two. The first is the case of *Ex parte Partington*, and the next is the case which has been so much relied on, of *Ex parte Gould*, decided by Sir John Leach. Now, had the subject-matter of that case been well considered—had it been argued, and his attention drawn to the distinction between the ordinary jurisdiction of the Court of Chancery, and its statutory powers in bankruptcy, that decision would have been entitled to all the weight of Sir John Leach's reputation: but it was not considered; the decision was given *ex parte* without argument; and nothing can be more unjust towards any Judge than to attribute any weight to his reported opinion under such circumstances. Unfortunately, however, that case has given rise to another, which has little to stand upon, if it cannot be supported upon better grounds than those of *Ex parte Gould*. In the case of *Ex parte Barrington*, the Vice Chancellor expressed himself thus:—"The only question here is, whether an order for specific performance can be made by the Court of Review in Bankruptcy. The order, which that Court pronounced, was made on the authority of *Ex parte Gould*, decided by the late Master of the Rolls, then Vice Chancellor, in 1822. . . . There being no reversal of *Ex parte Gould*, and no appeal from it, though that was the only authority for this order, still, as Lord Eldon has said, the authority of even a single case, if not appealed from, ought not to be disturbed on slight grounds." The case of *Ex parte*

Gould was not appealed from, and there could not have been a reversal of it. The Vice Chancellor could not have recollected, that in that case the purchaser did not appear, and could not have observed that Sir John Leach did not consider the point. Such a case, if followed, might make a practice certainly; but I mention what the Vice Chancellor said, to shew that, with the exception of that case, there is no pretence for the jurisdiction claimed. In *Ex parte Lucas*, Sir George Rose expressed great doubt upon that case. When, therefore, I find no authority but that case, and all subsequent cases professedly founded upon it, the only question is, whether, after this lapse of time I can disturb that case. But when I find that all Chancellors have repudiated the jurisdiction, I cannot say that an opinion, founded upon such a case as that, ought to make me hesitate to restore the practice to a sound state. Now, if such a jurisdiction could have been exercised at all, it might have been very safely practised by this Court, because this Court had machinery to do it; and as the public would have known well what they were doing, its consideration, on a question of title in bankruptcy, would have been as good as in a suit. But it must be considered, that if the Court of Review has this jurisdiction, they must be able to rescind, as well as to compel performance of, a contract. This Court will administer the same equity as in a suit; but it is clear that the Court of Review cannot do that, and it is not pretended. The holding of the Vice Chancellor, in the case of *Lautour v. Holcombe*, cited by Sir C. Wetherell, is important. The purchaser would be indeed in a bad situation if the Court of Review could act against him, but not for him. See how the practice of the Court of Chancery is illustrated by the interlocutory application in the case of *Casamajor v. Strobe* (20). Could the Court of Review have done what was done there? This Court brings before it not only everybody interested, but all necessary parties to the conveyance, which the Court of Review cannot do.

It is said, that this power can be exercised in simple cases. It is not claimed in

(19) 1 Mont. & M. 281.

(20) 2 Swanst. 347; s. c. Jac. 630; 1 Sim. & Stu. 381.

difficult cases, but if there be any jurisdiction in simple cases, there must be one in difficult cases also. Who is to decide the question of simplicity? The decision must in all cases precede the consideration of the question. The vendor may think his case simple, but that cannot be told till the hearing. I do not think it necessary, to support my view of this case, to overrule these authorities, notwithstanding my own clear opinion. But if all the prior authorities were as clear the other way, as I think they are this, I should still think that in this case the jurisdiction could not be supported, in consequence of the mode in which it has been exercised. I think that the jurisdiction does not exist, and that if it did, it would be most mischievous; and I discharge this order, but without costs.

M.R. }
May 3. } EYRE v. MARSDEN.

Practice.—Advancing Cause.

Where parties are very numerous, it is a ground for taking a cause out of its turn to prevent abatement.

Mr. Kindersley applied, with the consent of all parties, that this cause might be appointed to be heard on the first day of Trinity term, upon the ground, that the parties were very poor and very numerous, and abatements had occurred incessantly, and were likely to occur so frequently, that if the cause were to wait for its turn, there was scarcely a reasonable probability of its coming to a hearing.

The MASTER OF THE ROLLS.—This is a cause, in which the hardship of that delay which presses upon all suitors, is greater than usual; and I must, therefore, grant the application.

V.C. }
May 7. } In the matter of ALLSOP.

Practice.—Appointment of Guardian.

Order made without a reference, appointing the mother of an infant, only one year and a half old, to be its guardian.

In this case the Vice Chancellor made an order upon affidavit, without a reference, to appoint the mother of an infant, who was only one year and a half old, to be its guardian, upon the ground that, on account of the tender age of the infant, no other person could be so proper to be appointed.

Mr. Metcalfe and *Mr. Cooper* appeared for different parties.

L.C. }
May 9. } TURNER v. TURNER.

Evidence.—Interested Witness.

A testator shortly before his death, made a present of a cheque; and the question in the cause being, whether he was of sound mind at the time,—Held, that the evidence of a person who took benefits under a codicil executed at the same time, was admissible.

The bill in this case was filed, to have it declared that a testator was of unsound mind at the time when he made a present of a cheque for 500*l.* to the defendant, and to compel the defendant to refund. Among other evidence for the defendant, to prove the sanity of the testator, it was proposed to read the depositions of a servant of the testator, who took benefits under a codicil, which was executed contemporaneously with the gift. The codicil had been proved in the Ecclesiastical Court.

Sir Charles Wetherell, for the appellant, who was the plaintiff in the cause, objected to the admissibility of this evidence, on the ground that the servant was directly interested in considering the testator of sound mind, when he made the codicil, and consequently at the time of the gift.

The LORD CHANCELLOR (without hearing *Sir William Horne* and *Mr. Keene*, who were for the defendant,) said—The rule is, that you cannot receive the evidence of a person directly interested in the result of a suit; but this suit has nothing to do with the validity of the codicil, although it indirectly involves the circumstance upon which that must depend, viz. the sanity of the testator.

M.R.
 Jan. 24, 26, 29; } FERRARD V. GRIFFIN.
 April 23. }

Will—Construction.

*Testator bequeathed 300*l.* per annum to A. during his life, and to B. 150*l.* during his life, and to C. 150*l.* during his life; and he declared, that in case either B. or C. should die, the other should inherit the whole 300*l.*; and that if A. died without issue, then B. & C. should inherit from A. The testator then declared "that the reason why he left only the interest to A, B, and C, was, that if they died without issue, the money might go to his relations, X, Y, and Z." The gift to X, Y, and Z, on a previous occasion, having been declared too remote,—Held, that A. took an annuity for life only, and was not interested in the fund set apart for securing it.*

Zachariah Agace, by his will, dated the 3rd of November 1775, bequeathed as follows:—"I give and bequeath to my brother Jacob Agace 1,000*l.* I give and bequeath a further sum to my brother Jacob Agace, during his life, 300*l.* per annum. I give and bequeath to my nephew Zachariah Agace, during his natural life, 150*l.* per annum. I give and bequeath to my nephew Daniel Agace, during his natural life, 150*l.* per annum; and in case either of my nephews should die, the other to inherit the whole 300*l.*; and if my brother Jacob Agace dies without issue, then my two nephews, Zachariah Agace and Daniel Agace, to inherit from my brother Jacob Agace. I also give and bequeath to my aunt Mary Agace, 25*l.* per annum. I also give and bequeath to Mrs. Temperance Cole, 25*l.* per annum; these last are only for life; then to my dear wife. The reason why I leave only the interest to my brother Jacob and my two nephews is, that if they die without issue, the money may go to my relations, to be divided between my cousins James Legrew, Mrs. Susan Godard, widow of John Godard, and Mrs. Esther Privo, wife of Mr. Nicholas Sebire, three shares equally alike." The residue of his estate he gave to his wife Martha.

The testator died in the year 1778. A sum of 20,000*l.* 3*l.* per cent. consolidated bank annuities, was set apart to provide

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for the 300*l.* a year, and the two payments of 150*l.* a year given by the testator to his brother and two nephews. Jacob Agace died in the year 1782, without issue; from which time, the dividends of the 20,000*l.* stock were divided equally between the two nephews. Zachariah Agace died without issue, and Daniel Agace received the 600*l.* a year, till the year 1828, when he also died without issue.

In a former suit, relating to the construction of this will, namely, in *Lepine v. Ferard* (1), the 20,000*l.* was claimed by the representatives of the testator's cousins, James Legrew, &c., but it was decided by Sir J. Leach, and afterwards by Lord Brougham, that the gift over to them was void, as too remote, being a gift after an indefinite failure of issue.

In that case, Lord Brougham in delivering judgment, said, "It is not necessary for the present purpose to decide, and it was not necessary for the defendants to argue the question, whether the nephews took mere life estates, or whether they took absolute interests; although, looking to the wording of the clause, in which the testator assigns the reason for the peculiar form of his gift, the words seem to import a general failure of issue, and strongly favour the opinion that they took absolute interests."

In the present suit, the 10,000*l.* consols, set apart to secure the annuity of 300*l.* a year to Jacob, was claimed by the plaintiff as representing the residuary legatee of the testator, as part of his estate undisposed of; and it was also claimed by the defendants, the representatives of Jacob, on the ground, that there was an absolute gift of the corpus to him, namely, a gift for life, with an implied remainder to his issue, which was equivalent to an estate tail in realty, and would therefore give an absolute interest in personality.

Mr. Pemberton, Mr. Temple, and Mr. Stuart, for the plaintiff.

Mr. Tinney, Mr. Coote, and Mr. Paynter, for the defendant Lepine.

Wilkinson v. South, 7 Term Rep. 555.

Tissen v. Tissen, 1 P. Wms. 500.

Gawler v. Cadby, Jacob, 346.

(1) 2 Rus. & Myl. 378; s. c. 1 Law J. Rep. (N.S.) Chanc. 150.

Trotter v. Oswald, 1 Cox, 317.

Massey v. Hudson, 2 Mer. 130.

Doe d. Lyde v. Lyde, 1 Term Rep. 593,
were cited.

THE MASTER OF THE ROLLS.—The object of this suit is, to ascertain who is entitled to the sum of 10,000*l.* consols, set apart to answer an annuity of 300*l.*, given by the will of Zachariah Agace. [His Lordship stated the circumstances of the case.] The plaintiff claims to be entitled to these monies, as part of the residue of the testator's estate. The defendants claim it as part of the residuary estate of Jacob Agace, on the ground, that Jacob was entitled absolutely to a sum sufficient to produce 300*l.* a year, and not to the yearly sum of 300*l.* for life. It is a question of construction; if Jacob was entitled for life only, the plaintiff is now entitled to this sum, but if Jacob was absolutely entitled, then, it is said, the length of time debars the defendants from making their title available. It was argued, that Jacob was entitled to a sufficient sum to produce 300*l.* a year, and that the effect was the same as if the testator had first bequeathed a sum which would produce 300*l.* a year, for life, and afterwards used words to enlarge this limited gift into an absolute interest. It must be admitted, that Jacob was entitled to have a sufficient part of the testator's estate invested, to secure his annuity of 300*l.* a year, but when the testator, after giving 1,000*l.* to Jacob, gives him "a further sum of 300*l.* per annum during his life," I think the words only import an annual sum for life, and are in no way affected by the way in which the executors were bound to provide for the annuity. It was the duty of the executors to purchase 10,000*l.* consols, to secure the annuity, but the gift was only of 300*l.* a year for life: and how that portion of the estate which was to be invested to secure it, was to devolve, is to be collected from the other parts of the will. The testator bequeathed 150*l.* per annum each, to his nephews, Zachariah and Daniel, during their natural lives; and to these words were added, "and in case either of my nephews should die, the other to inherit the whole 300*l.*;" and it may be observed, that the gift being of an annual sum for life only, the testator by the word

"inherit," means an immediate succession, and that, on the death of one, the annuity is to go immediately to the other. The testator proceeds—"If my brother Jacob Agace die without issue, then my two nephews Zachariah and Daniel to inherit from my brother Jacob." I think it probable that the word "inherit" is used to express immediate succession, and the effect of the whole, if unaffected by other words, would give annuities for life of 300*l.*, 150*l.*, and 150*l.*, with a limitation of Jacob's annuity to Zachariah and Daniel for life, if Jacob should die without issue. The testator afterwards says, "The reason why I leave the interest to my brother Jacob and my two nephews is, that if they die without issue, the money may go to my relations, to be divided between my cousins James Legrew," &c. This gift over has been declared to be too remote, but the words shew that the testator only intended to give to Jacob and his nephews for life; and although I think that the meaning of the gift over of the "money," was the money intended to be invested for securing the annuity; and from the words, "dying without issue," used with reference to Zachariah and Daniel, as well as Jacob, the testator intended, by the word "money," that part which was to be invested to secure the annuity to go to the issue of Zachariah and Daniel, yet the gift to Jacob is expressly for life; and there is no gift to him of the principal money. The question as to remoteness, with reference to the gift over to Zachariah and Daniel, which arises on the will, it is not necessary to decide in this case; and I am of opinion, that whether the gift over to Zachariah and Daniel was too remote or not, that Jacob was entitled to a life interest in the 300*l.* a year only, and not to any interest in the capital, and, therefore, in the events which have happened, that the plaintiff is entitled to the sum of 10,000*l.* consols.

V.C. }
April 23. } WOODLEY v. BODDINGTON.

Practice.—*Injunction—Contempt.*

After a plaintiff at law had obtained a writ of exigi facias, and the first of the five necessary proclamations had been made, the

defendant served him with an injunction to restrain him from taking further proceedings at law. After such service, three of the further proclamations were made:—Held, that this amounted to a breach of the injunction; and the Court ordered that the plaintiff at law should not have the benefit of any proclamations made since the injunction had been served.

In this case, the plaintiff moved that the defendant might stand committed to the Fleet, for breach of a writ of injunction. The breach consisted in the defendant proceeding against the plaintiff under a writ of *exigi facias*, and proclamations in the Queen's Bench.

The common injunction was obtained in this cause for want of answer on the 15th of February 1838, and was served on the solicitor of the defendant, on the 14th of March following. Previously to the service of the injunction, the defendant had sued out a writ of *exigi facias* against the plaintiff, and the sheriff had made the first proclamation. Subsequently to the service of the injunction, three of the four remaining (1) proclamations were made. The fifth and last had not been made when the motion was heard. The writ itself was not returnable until the 30th of April.

It appeared from the affidavits of the plaintiff's solicitor, that as soon as the sheriff, to whom the writ was delivered, had notice of the injunction, he applied to the solicitor of the defendant, and requested information as to how he was to proceed. That the solicitor of the defendant answered, he had no further instructions to give him.

Mr. Jacob and Mr. H. Clarke, in support of the motion, insisted that this answer to the sheriff was in effect a direction to him to proceed; that the sheriff was the agent of the party suing out the writ, and if the agent was not prohibited working out that writ, his principal was guilty of a contempt for breach of an injunction. If a person had sued out a writ for the purpose of arresting a person, and had placed that writ in the hands of the sheriff, and, before the sheriff had made the arrest, an injunction from this Court issued re-

straining proceedings at law, the plaintiff at law would be bound to give notice to the sheriff, to desist from arresting the other party. They cited—

Marsack v. Bailey, 2 Sim. & Stu. 577; s. c. 4 Law J. Rep. Chanc. 205.

Bullen v. Ovey, 16 Ves. 141.

Bolt v. Stanway, 2 Anstr. 556.

Mr. K. Bruce and Mr. L. Wigram, contra.—In *Marsack v. Bailey*, the plaintiff at law was obliged to sue out the *allocatur exigent* (2). Now, this was clearly taking a step in the cause after an injunction. Here, the defendant has taken no active step. The writ was properly issued; the first proclamation was properly made, before any injunction; the sheriff may proceed to perfect the process at law, provided the plaintiff at law takes no other active step in the cause. It is no contempt of this Court, that the plaintiff at law has not put an end to the authority of the sheriff, even if he could do so—*Franklyn v. Thomas* (3). Should the Court eventually dissolve the injunction, unless terms are imposed upon the plaintiff, this writ will be destroyed. Lastly, this is not an application to modify or regulate any benefit the defendant has derived from these proceedings, subsequently to the service of the injunction; it is not a motion that the plaintiff may be restored to the same situation, as if no such proceedings had been had, but simply a motion to commit the defendant for a breach of an injunction. As therefore no contempt has been incurred, this motion ought to be dismissed with costs.

Mr. Jacob, in reply, contended, that the answer given by the defendant's solicitor, that he had no further directions to give, was virtually telling him to go on, and disregard the injunction; and was equivalent to taking such an active step as was taken in *Marsack v. Bailey*.

THE VICE CHANCELLOR.—This application is entirely new in species, and must be decided on principle. *Franklyn v. Thomas* was a strong case. Upon a given day, the plaintiff in equity would have been entitled to an injunction, if there had been no demurrer, plea, or answer. A demurrer was put in, and was overruled. On the overruling of

(1) 31 Elis. c. 3. s. 1.

(2) 1 Tidd. Prac. 150, 7th edit.

(3) 3 Mer. 234.

the demurrer, the common injunction was moved for; and an application was made, (upon the ground of the demurrer having failed,) that the plaintiff in equity might be put in the same situation as if the injunction had issued on the usual day, in default of answer: and the Lord Chancellor thought it right to devise such an order as would put the plaintiff in the situation asked for by the application. Now, that is not quite this case. Lord Eldon appears to have thought, that if, after the common injunction, the sheriff had so far proceeded in the execution of a writ, as to have actually sold and received the money, then, inasmuch as the rights of third parties, namely, the purchasers, would intervene, there ought not to be a reinstatement of the property; but, at the same time, he appears to have thought, that the money ought to be paid into court, and ought not to remain in the hands of the sheriff.

Now, it appears to me, that by ordering the money to be paid into court, the plaintiff at law is in a worse situation than if the money had been allowed to remain in the hands of the sheriff, for in the latter case the plaintiff at law might at any time after dissolution of the injunction, make himself master of the fund, by a rule of course, against the sheriff; whereas, in the former case, the money must be obtained out of this court on special application. I am also of opinion, that the sheriff is, for the purposes of this writ, the agent or servant of the plaintiff at law; and any intimation from that person to the sheriff would not only be an indemnity to the sheriff against the consequences of not proceeding, but also a virtual order not to proceed. It also appears, that a distinct communication on this subject was made by the sheriff to the solicitor of the plaintiff at law; and such solicitor in answer says, in effect, he will do nothing. When this species of application is made, I must consider a refusal to countermand to be virtually an order to go on; and it is moreover a contempt. But, of course, as it was not a wilful contempt, no order for committal will be made.

The Court then ordered, that the plaintiff at law should not have the benefit of any proceedings or proclamations since the day

of the service of the notice of motion, (14th of April 1838,) and that the plaintiff at law should pay the costs of this motion.

L.C. }
April 23, 24. } BICKHAM v. CRUTTWELL.

Will—Devise subject to a Mortgage—Exoneration.

A testator having an estate at X, which was subject to mortgages thereon, devised it, together with other property, to A, "the whole subject to the mortgage debt thereon;" and he bequeathed his personal estate, subject to the payment of his debts, except such debts as were in his will excepted therefrom. He also devised a third property, subject to the mortgages thereon, from the payment of which, he exempted his personal estate:—Held, that the personal estate was not exonerated from the payment of the mortgage on the estate at X, and that the devisee thereof was entitled to have the mortgage thereon discharged out of the personal estate.

Richard Bowsher, of Bath, solicitor, the testator in the cause, being seised of certain lands in the parish of Walcot, determined on building thereon a crescent, to be called Norfolk Crescent. In pursuance of this design, he employed a carpenter named Richard Orchard, as his agent, to superintend the building; and by several indentures, dated respectively the 24th and 25th of March 1808, and the 18th and 19th of May 1812, he conveyed the ground comprising Norfolk House, and Nos. 1 and 3 in the Crescent, to Orchard, in fee, subject to ground rents of considerable amount, which he reserved to himself, and to covenants and restrictions usual in conveyances of houses in rows. Although the above indentures purported on the face of them to be absolute conveyances, they were, in fact, made without any consideration moving from Orchard, and upon an understanding between him and the testator, that Orchard was to be merely a trustee of the property, and was to deal with it entirely according to the testator's directions, but, that as a remuneration for his trouble, one moiety of the profits that might arise on a sale from the buildings,

was to be paid by the testator to Orchard. By the direction of the testator, Orchard made two several mortgages of the property to Archdeacon Wiles, (a friend of the testator's,) the first for securing 900*l.* and interest, and the second for securing 2,000*l.* and interest. Each of these mortgages were made by Orchard, within a very short time after the premises respectively comprised in them had been conveyed to him by the testator, as before mentioned. The testator received the whole of the mortgage money and joined with Orchard in a bond to Archdeacon Wiles, for securing the second sum of 2,000*l.*; and he paid to Orchard merely sufficient to enable him to go on with the building. In the year 1820, it appearing that no profit, but on the contrary, a loss was likely to accrue upon the building speculation, it was agreed that Orchard should reconvey the property to the testator; and by indentures, dated the 10th and 11th of February 1820, Orchard conveyed it accordingly to one John Routh, and his heirs, in trust for the testator in fee. The indenture of release recited the real nature of the transactions between Orchard and the testator to the effect before stated.

The testator, by his will, dated the 4th of July 1834, gave and devised certain premises, called Kensington Place, (subject to certain annual payments issuing out of the same,) "his three houses in Norfolk Crescent, called Norfolk House, and Nos. 1 and 3, his house No. 17, Great Stanhope Street, and his two houses Nos. 11 and 12, Kensington Place, the whole *subject to the payment of the mortgage debt of 2,900*l.*, (borrowed on mortgage of the houses in Norfolk Crescent, by Richard Orchard, of whom he purchased the same,) to the representatives of the late Archdeacon Wiles, or such part thereof, as should remain undischarged at his decease; and subject likewise, to the annual ground rents reserved, and made issuing and payable to him out of the said several messuages unto Charles Currie Bickham (the plaintiff) and his sister Harriet, as tenants in common in fee; and as to the rest and residue of his real estates, and as to all his personal estate and effects, he gave, devised, and bequeathed the same,*

subject, nevertheless, to the payment of his just debts, funeral and testamentary expenses, (except such debts as were therein excepted therefrom,) and the expenses attending the trusts thereof," to some of the defendants, and to the plaintiff upon the trusts thereafter mentioned; and in the declaration of trust as to the residuary estate, the testator made use of the words following: i. e. "And also my four messuages, Nos. 3, 4, 5, and 6, in Nelson Place, aforesaid, subject to the mortgages made on the said last-mentioned messuages, or such part or parts thereof as may remain unpaid at my decease, and from the payment of which said mortgages, I hereby exempt my personal estate."

The testator died shortly after making his will, and after his decease, Harriet Bickham conveyed all her interest under the will to the plaintiff, her brother, absolutely. The bill was filed, for the purpose of having it declared by the Court, that the personal estate of the testator was liable to pay the two mortgages of 900*l.* and 2,000*l.*, in exoneration of the three houses in Norfolk Crescent. Orchard was a man of no property, and from entries in the testator's account-books, which were read, and much commented upon in the course of the argument, it appeared that the testator had uniformly paid the interest on the mortgages. It was also proved that Orchard executed the mortgages and bond, without hearing them read or knowing their contents.

The Solicitor General, Mr. Wilcox, and Mr. Platt, for the plaintiff.—There is a complication in these transactions, which, at first sight, creates some difficulty, but on examination, there cannot be the slightest doubt as to the relation in which Orchard really stood to the testator. The motive which induced the testator to deal with this property in such an unusual manner, nowhere appears; perhaps, as a solicitor, he did not wish to appear concerned in building speculations, but it is immaterial to conjecture his motive, since the recitals of the deed of 1820, in addition to parol evidence, abundantly and conclusively establish the fact, that he was throughout, the real owner of the property, and that the mortgages were made on his account. Both the mortgages being therefore the

debts of the testator, the rule of law is clear. The words of the devise, "subject to the payment of the mortgage debt of 2,900*l.*," are of no effect to exempt the personal estate from its primary liability. This was decided in *Serle v. St. Eloy* (1), *Galton v. Hancock* (2), and followed in the recent case of *Kent v. Leeks* (3). The only words in the will that can be considered adverse to the claim of the plaintiff, are these, "borrowed on mortgage of the houses in Norfolk Crescent by Richard Orchard, of whom I purchased the same." It may perhaps be said, that the testator's own description concludes the question. But that was merely his way of stating the transaction, and his misdescription cannot alter the nature of property. It is clear, that there never was, in fact, any purchase from Orchard. There is nothing in this will to furnish that strong evidence of intention which a court of equity requires to be expressed or clearly implied, before it will hold the personal estate divested from its usual course of applications—*Tait v. Lord Northwick* (4).

Mr. Tinney and *Mr. Pigot*, contra, submitted, that the testator's intention was sufficiently shewn, that the devisees of the three houses should take them *cum onere*, and that they must therefore be considered as legatees of a mere equity of redemption, taking subject to the mortgage: that the testator had charged other property not comprised in the mortgages with the payment of the mortgage-money; and this, combined with the express words of the devise, "subject to the payment of the mortgage," shewed that he did not intend his personal estate to be applied in such payment. That the testator had not in his account-books, charged himself, as between himself and Willes, with the debt of 2,900*l.*, although he had given himself credit for payments of interest thereon. Much weight attached to the testator's own view of the subject, according to the description in his will; and a recital of a loan in a will binds legatees, except as to a clear mistake of figures—*Robinson v. Bransby* (5). That

it was highly important that the testator in the clause, where he charged his personal estate with the payment of his debts with an exception, makes use of the words, "except such debts as are *herein* excepted therefrom." He did not use the word *hereinafter*, and thereby point exclusively to the express exemption contained in the subsequent part of the will, but, by using the word *herein*, he had himself put a construction upon the former words in the will, "subject to the mortgages," and shewed that by those words he intended to exonerate his personal estate. The testator was himself a solicitor, and therefore familiar with the words *herein*, *hereinbefore*, and *hereinafter*, which he had used accurately in his will, and so as to shew that he understood the proper force of these words.

Hancox v. Abbey, 11 Ves. 179.

Boote v. Blundell, 1 Mer. 193.

Tower v. Lord Rous, 18 Ves. 132.

Waring v. Ward, 5 Ves. 670.

Clutterbuck v. Clutterbuck, 1 Myl. & K. 15; s. c. 2 Law J. Rep. (n.s.) Chanc. 113.

Burton v. Knowlton, 3 Ves. 107.

Mr. Barlow, for the defendant Cruttwell.
The Solicitor General, in reply.

April 24.—The LORD CHANCELLOR.—My difficulty in this case does not arise from any doubt that I entertain as to the rule of law upon the subject before me; but in discovering what real interest the testator had in the property in question, and whether the mortgage-debt was in reality the debt of the testator. It appears, that the testator conveyed the building land to Orchard, subject to the payment of the fee farm rents, and that after that conveyance, Orchard was the person apparently and ostensibly the owner of the land; he raised money upon it; so far it would appear that the land was not Bowsher's, but Orchard's. Bowsher having again become possessed of the property by the deed of re-conveyance of 1820, by his will devises it by the description of the three houses in Norfolk Crescent, subject to the mortgages made by Orchard, "of whom I purchased the same." That would certainly shew that there might have been a debt of Orchard's upon the

(1) 2 P. Wms. 386.

(2) 2 Atk. 437.

(3) 4 Law J. Rep. (n.s.) Chanc. 111.

(4) 4 Ves. 816.

(5) 6 Mad. 348.

property, at the time when the testator bought it; but the evidence, which may be used for the purpose of understanding the situation of the parties, satisfactorily shews that this was not the case. The recitals of the deed of 1820 clearly shew that Orchard was merely a trustee for Bowsher. Now, if that deed did purposely misrepresent the nature of the transaction, (which is very unlikely,) Bowsher was a party to all the misrepresentation. A possible motive for the original conveyances has been suggested, viz. that Bowsher being a solicitor, might not wish to appear engaged in building speculations; but there could have been no reason, if Orchard had been really the borrower, for misrepresenting the fact in the deed of 1820. Besides, Orchard does not appear to have been ever possessed of property to any considerable amount. [His Lordship here read the recitals in the deed of 1820.]—The result is, that the entire transaction was Bowsher's; that he built the houses, and raised the money; and that Orchard was a mere trustee, and agent for him. With respect to the largest mortgage, it appears to have been raised by Orchard, and further secured by a bond, in which Orchard appeared to be the principal, and Bowsher the surety. This was consistent with the intention of keeping Bowsher out of sight; but as between himself and Orchard, he was the principal, and Orchard the surety only. It is said, that the expression, "of whom I purchased the same," is not consistent with the recitals of the deed; and undoubtedly it is not strictly consistent; but it is necessary to look at all the circumstances together, in order to ascertain what was the real history of the transaction, and the result of the investigation leaves no doubt upon my mind.

I was, at first, somewhat staggered by the books, which contain no entry as to the houses in Norfolk Crescent, until after the re-conveyance of 1820; but on examination, I find that the account of payments of interest, and other matters in respect of these houses, was carried on under another title—viz. the name of Orchard. Under this head, several sums of money advanced to Orchard appear; and it is impossible to suppose that they were lent to him. The books, therefore, thus explained, are

not inconsistent with the deed; and the result of the investigation leaves no doubt in my mind that the whole was the speculation of the testator.

The question of law must therefore be looked upon, on the supposition that the mortgages were debts of Bowsher; and if they were the debts of the testator, the question of law presents no difficulty at all, because the testator gives these three houses, and joins other property; and the mortgage being on the three houses alone, he gives "the whole, subject to the payment of the mortgage debt of 2,900*l.*, borrowed on mortgage of the houses in Norfolk Crescent;" and he gives all the rest of his real and personal estate, "as to his personal estate, subject to the payment thereof of all his debts, except such debts as were therein excepted therefrom," to the defendants upon trust; but he declared, that the houses in Nelson Place should remain liable to the mortgages existing thereon, and from the payment of which mortgage monies he exempted his personal estate; so that he gives one property subject to the mortgage, but without any directions exonerating his personal estate therefrom, and he gives the other mortgaged premises, subject to the mortgage affecting it, with an express direction that the personal estate shall not be called on to pay them; and he bequeaths the residue of his personal estate, subject to the payment of his debts, except such debts as were therein excepted therefrom, which amounts to a declaration in terms, that the personal estate shall pay all the debts, except those specially excepted. What are the excepted debts?—why the mortgage on that property, which was in Nelson Place, and is not in question in this cause. It also appears, that both in the exception, and in the enumeration of the debts, from the payment of which the personal estate is exempted, the debts in question are not to be found. Then, what is found on the face of the will with reference to the houses in question? They are given subject to the mortgages. Now, it is quite clear, that these words will not exonerate the personal estate. It is doing no more than subjecting the property to that which it was before liable to; and it is a matter of decision, that these words do not amount

to an exoneration of the personal estate, and that the party taking the property is entitled to an exoneration out of the personal estate. The effect of this clause is, to give an additional charge, and a further security to that which the mortgagee had before. What purpose the testator had in view does not appear; and it is not improbable, that he may have considered, that he was exonerating his personal estate.

It has been supposed, that Sir W. Grant, in the case of *Hancox v. Abbey*, spoke of a general charge in a manner favourable to the defendants. But the circumstances of that case were extremely different from this. That was not a devise of property, "subject to a mortgage." I do not wish to be thought to doubt that decision—I am not called upon now to consider it; but whether decided right or wrong, it does not touch the present case. There was a devise in trust to sell, and a devise of the property after that operation had been performed. Sir W. Grant there referred to the facts before him, and did not lay down any general proposition. I cannot discover any motive the testator could have in charging additional property with the mortgage debts; perhaps the houses were of less value than supposed, or the terms of friendship which subsisted between him and Archdeacon Willes may have induced him to give additional security; but the Court cannot speculate upon what the testator really meant. The rules of the court have been relaxed, but still the burthen of shewing that the intention of the testator was to exonerate his personal estate is thrown on those who claim the benefit of such an intention—it is no longer required that it should be expressed, but a manifest intention in the will must still be shewn. The Court must be satisfied, from what the testator has said, that such was his intention. The ordinary distribution of property is not to be altered, except an intention be so shewn; and therefore, the party here seeking to alter the rules of distribution, must shew the intention on the face of the will. Although, therefore, I may have great difficulty in reconciling some expressions of this will, yet I find no direction that these mortgages should be otherwise paid. It is said, that the testator has declared the mortgage is

not his own debt; but I am satisfied he knew that it was his own debt. I must take him to have been conscious of the rules of law. He might, had it been really his intention, have said, that he did not intend his personal estate to pay these mortgages; and if such had been his intention, I cannot suppose that he would have expressed it in the way he has, when a simple mode was at hand.

The defendant admitting assets, decree according to the prayer of the bill; the costs of all parties to be paid out of the personal estate.

L.C. }
April 26. } *Ex parte PRIDEAUX.*

Bankrupt—Articled Clerk—Apprentice.

An articled clerk to an attorney is not an apprentice within 6 Geo. 4. c. 16. s. 49.

This petition came before the Lord Chancellor by way of appeal in a special case from the Court of Review. The substance of the arguments used, will be found in the report of the hearing in the court below, under the name of *Ex parte Fussell* (1).

Mr. Bethell, for the appeal.

Mr. Swanston and *Mr. Bacon*, contra.

THE LORD CHANCELLOR.—The question in this case is, whether an articled clerk to an attorney is entitled to the benefit of the 49th section of the act 6 Geo. 4. c. 16. By that section, it is enacted, "That where any person shall be an apprentice to a bankrupt at the time of issuing of the commission against him, the issuing of such commission shall be and enure as a complete discharge of the indenture or indentures, whereby such apprentice was bound to such bankrupt; and if any sum shall have been really and *bonâ fide* paid, by or on the behalf of such apprentice to the bankrupt, as an apprentice fee, it shall be lawful for the commissioners, upon proof thereof, to order any sum to be paid to or for the use of such apprentice, which they shall think reasonable, regard being had, in estimating such

(1) 3 Mont. & Ayr. 67; s. c. 6 Law J. Rep. (n.s.) Bankr. 34.

sum, to the amount of the sum so paid by or on behalf of such apprentice to the bankrupt, and to the time during which such apprentice shall have resided with the bankrupt previously to the issuing of the commission." Now, I am to consider whether an artied clerk can be treated as an *apprentice* within the meaning of the section which I have read. In one sense, he may be called an *apprentice*, the intention being that he should *learn* the business; but the Court, in construing this act, must not go to the derivation of the word, but must consider whether the statute has put any particular meaning upon the word, or whether it was meant to use it in the ordinary acceptation. The statute 5 Eliz. c. 4, in sections 25 to 30, both inclusive, authorizes persons carrying on certain descriptions of trade therein mentioned to take apprentices, and the business of an attorney is not there specified. The first statute relating to artied clerks, is the 2 Geo. 2. c. 23. They are mentioned in many subsequent statutes, some of which have passed for fixing the stamps on their being artied, and others for regulating their duties. But all these statutes imply a distinction. Artied clerks are nowhere called apprentices. The regulations and stamps are always different. The Chief Judge refers to the Irish Stamp Act, 55 Geo. 3. c. 78; but even that statute, where it says, "apprentices other than artied clerks," distinguishes rather than unites them; and, moreover, it is open to the remark that the language of that statute may be considered as laying down the meaning of words with respect to *Ireland* only. Upon the whole, it seems to me, that various statutes have given to the term "apprentice" a defined meaning, totally distinct from that of an artied clerk; and I agree with the opinion of his Honour the Chief Judge. Sir George Rose was at first of the same opinion, although he afterwards differed. It is not probable that the legislature should have intended to extend the operation of this section to artied clerks, because attorneys are not, generally speaking, within the bankrupt laws. It would be a great deal to assume an intention on the part of the legislature, to provide for such a case as that now before me. It does not follow, that an attorney becoming bankrupt, must

lose all his business, and, therefore, the purposes for which this clerk was artied may still in some measure be answered. I should, however, be very glad, if I could, to relieve this gentleman from the situation in which he is placed, but I am clear that I cannot do so under this act.

Judgment of the Court of Review reversed.

M.R. }
Dec. 4, 5; } WOOD v. WHITE.
April 23. }

Power—Specific Performance—Vendor and Purchaser.

A testator devised his real estate, as to one-fifth part thereof, to trustees, in fee, on trust, to pay the income to William for life, and after his death to convey it to his children, and as to another fifth, to apply the income towards the maintenance of the testator's daughter, until she should be married, and then, if under twenty-five, settle it in a particular way. The testator then gave to his trustees a power of selling the property "during the continuance of the trusts by his will reposed;" William died, and the daughter attained twenty-one, and married, but no conveyance had been made by the trustees:—Held, that the power of sale could not be then exercised, for though the trusts still existed, yet they did not exist in the way contemplated by the testator.

The facts of this case are fully stated in the judgment of the Master of the Rolls, the question argued being, whether a power of sale was, under the circumstances, still existing and capable of being exercised, or whether it was void as being obnoxious to the rules against perpetuities.

Mr. Pemberton and Mr. Forster, for the plaintiff.

Mr. Tinney, Mr. E. Lloyd, and Mr. Braithwaite, for the defendants.

The following cases were cited and commented on:—

Trower v. Knightley, 6 Mad. 134.

Biddle v. Perkins, 4 Sim. 135.

Ware v. Polhill, 11 Ves. 257.

Boyce v. Hanning, 2 Cr. & Jer. 334;
s. c. 1 Law J. Rep. (n.s.) Exch. 123,
and 2 Tyr. 327.

2 E

Cox v. Chamberlain, 4 Ves. 631.

Corder v. Morgan, 18 Ves. 344.

THE MASTER OF THE ROLLS.—This is a bill filed by the vendor against the purchaser of the estate in question for the specific performance of an agreement. The purchaser objected, that the plaintiff could not make a good title to the estate; and the case is, that John Wood, by his will, dated the 2nd day of May 1816, after giving a portion of his real estate and his household goods to his wife for life or widowhood, and charging an annuity of 500*l.* for her benefit on the residue of his real estate, gave, devised, and bequeathed all his real and personal estate, subject to the interest therein which he had given to his wife, to his children—that is to say, one equal fifth part to his son John, his heirs, executors, administrators, and assigns, and another equal fifth part to his son Henry in like manner, and another equal fifth part to his son Thomas Philpot in like manner, another equal fifth part to his sons John and Henry, their heirs, &c., in trust to pay the income to his son William for life; and after the death of William, to convey and assign the fifth part to the children of William as tenants in common, with a proviso for certain limitations over; and he gave the remaining fifth part of his real and personal estate to his sons John and Henry, their heirs, executors, administrators, and assigns, in trust, to apply the income thereof to the maintenance and support of his daughter, until she should attain twenty-five years or be married; and on her attaining twenty-five, if then unmarried, to convey and assign the same fifth part to her, her heirs, executors, administrators, or assigns; but if she should marry before that age, then with the advice of the testator's wife, if living, to convey, assign, and settle the same in manner therein particularly mentioned. And the will contained a proviso, whereby the testator declared, that it should be lawful for his sons John and Henry, and the survivor of them, and the heirs and assigns of such survivor, at any time during the lifetime or widowhood of his wife, or at any time afterwards, during the continuance of the trusts, by his will reposed in them, with the consent and approbation in writing of his wife, under her hand, during her life-

time or widowhood, and afterwards with the consent and approbation in writing of the person or persons for the time being in the possession of or entitled to the receipt of the rents and profits of the premises proposed to be sold, under his, her, or their hand or hands, or of their or his own authority, if such person or persons should be in his, her, or their minority, to sell, dispose of, and convey all or any of the messuages, lands, tenements, hereditaments, and real estates, as should be subject to such continuing trusts, and the fee-simple and inheritance thereof to any person or persons whomsoever, for such price or prices as should be deemed reasonable, and upon payment of the money arising by such sale or sales, to sign and give proper receipts for the same, which receipts should be a sufficient discharge to the purchaser or purchasers for so much of the purchase-money or purchase-moneys as should be therein acknowledged or expressed to be received, and such purchaser and purchasers should not afterwards be answerable for any loss or misapplication of such purchase-moneys;” and he stated his will to be, that the money arising by the sale should be subject to the same trusts that were declared of and concerning the residue of his personal estate, or such parts or part thereof as to which the trusts before declared should be continuing at the time of the sale; and he appointed his wife and his sons John and Henry, executrix and executors of his will.

The testator died in the year 1820, leaving his wife and five children surviving him. After his death, his son Thomas Philpott, and his daughter Eliza, attaining twenty-one years of age, and William married and had issue. In June 1825, Eliza being then twenty-three years of age, intermarried with Bernard Maynard Lucas, and on that occasion, a settlement was made by deed, dated the 6th of June 1825, between Ann Wood, the widow, of the first part, Eliza Wood, of the second part, John and Henry Wood, of the third part, Bernard Maynard Lucas, of the fourth part, and John Wood, Thomas Philpot Wood, and the Rev. Thomas Burton Lucas, of the fifth part; and thereby, after reciting the will, and that the testator's personal estate had been converted into money, and that no part of the real estate

had been sold, although it was expected and intended that the same should be sold at such time or times as should be most convenient and proper under the power contained in the will, it was witnessed, that Eliza Wood, with the approbation of the parties of the first, third, and fourth part, bargained and sold to John and Thomas Philpot Wood, and Thomas Burton Lucas, all her part or share of the monies to arise by the sale of the testator's real estate, and of and in the security on which the same should be invested, and also of the monies consisting of the testator's residuary personal estate on the trusts after mentioned, for the benefit of Eliza Wood, her intended husband and their issue; and the estate, until sold, was to be subject to the same trusts.

Of this marriage, there is not at present any issue. The son Henry died in 1826, having devised and bequeathed his share of the estate to his mother, Ann Wood, who died in 1827, having devised and bequeathed the same to her sons John and Thomas Philpot; and William Wood has since died, leaving three infant children. In this state of things, and, by agreement, dated the 27th of June 1835, John Wood, the surviving trustee and executor, contracted to sell the estate to the defendant. No objection is made to the title to the shares which were devised to the sons John, Henry and Thomas Philpot; but it is contended, that no title can now be made to the shares given to the son William, and to the daughter Eliza; those shares could only be sold under the power given by the will; and that power, it is contended, has ceased, or become incapable of being exercised.

The power is to be exercised only during the lifetime of the widow, or during the continuance of the trusts by the will reposed in the trustees. The widow is dead; and it is said, first, that the trusts as to the shares of William and Eliza are not now continuing; and, secondly, that if the trusts as to the shares of William are continuing, they are of a nature to last through a succession of minorities; that there is nothing to limit the period within which the power may be exercised; and that it, therefore, falls within the rule of law against perpetuities. Upon the question, whether the trusts are continuing, I apprehend that we are to consider, not merely whether the trusts are

performed, but whether they are continuing in the manner and under the circumstances in which the testator intended them to be. They may be unperformed; and in that sense, being still to be performed, they may be continuing; there may be an obligation on the trustees to perform them now; but if events have taken place, on which they ought to have been performed, they are not continuing, in the sense in which the testator intended them to continue; and it does not appear to me, that the trustees, by omitting to perform their trusts at the time when they ought to perform them, could at their pleasure prolong the time, during which a power depending on the continuance of the trusts is to be exercised.

With regard to the trusts in this cause, the material facts are, that before the date of the contract, the testator's son William died, leaving infant children, and his daughter Eliza married under the age of twenty-five years. As to the share of William, it was devised to the trustees, on trust to pay the rents and produce to William for his life, and from and immediately after his decease, to convey and assign the same shares to all and every the child and children of William, as tenants in common, equally to be divided among them, share and share alike, and their respective heirs, executors, administrators and assigns, with a proviso, that if any one or more of such children should die under twenty-one years of age, without leaving issue, the part or share of him, her, or them so dying should go and be conveyed and assigned to the survivor or other of them as tenants in common, and if all should die under twenty-one years of age, without leaving issue, the testator gave William's share to his other children. The trust, therefore, as to William's share, was intended to be performed on his death; it was then that the conveyance was to be made to his children, with such contingent limitations over, as are described in the will. It does not appear that the infancy of William's children formed any obstacle to the conveyance being made at the time when the testator directed it to be made. A limitation might have been so framed as fully to accomplish the purpose which the testator had in view; and if so, the trust ought to have been then performed, and it is not since continuing, unperformed in

the testator's intention, although it is still unperformed.

As to the share of Eliza, it was vested in trustees, on trust for her until she attained the age of twenty-five years, and if then unmarried to convey it to her, but if she should marry under that age, which was the event that happened, then the trustees were, immediately after the marriage, with the advice and concurrence of the testator's widow, to convey, assign, and settle all or such part of Eliza's share, as they, with the same advice and concurrence, should deem proper, to such uses, and on such trusts for the benefit of Eliza and her issue, with such reasonable interest in favour of her intended husband, as they might think proper, and to convey and assign the residue to Eliza, as she should appoint. And thus it appears, the trusts as to Eliza's share were to be executed on her marriage. The conveyance and assignment were then to be made; the trusts of the will were then to be completed; and the trusts of the settlement were then to commence: and although this has not been strictly done, and the trusts of the will in some respects have not been performed, yet it does not appear that they are continuing, as the testator intended them to continue. And it appears to me, as to the shares of both William and Eliza, that the continuance of the trust at the present time arises not from the directions of the testator's will, or from his intention, but from an omission on the part of the trustees to follow strictly the directions which he has given: I am of opinion, that the trust now existing is not a continuance of the trusts intended by the will, as reposed in the trustees by the testator; and, therefore, not a trust during the continuance of which the power may be exercised. I think, therefore, that the power is at an end, by the determination of the trusts, as intimated by the testator; and such being my opinion, it is not necessary for me to consider the other very important question, which was argued in this case, as to the validity of the power, on the supposition that the trusts were continuing.

Under the circumstances stated, I am, therefore, of opinion, the plaintiffs are not entitled to a specific performance of this agreement, and that the bill must be dismissed, with costs.

V.C. }
April 23. } BOYS v. TRAPP.

Publication—20th Order, 1833—3 & 4 Will. 4. c. 94. s. 13—Construction.

By 3 & 4 Will. 4. c. 94, it is directed, that all applications for enlarging publication, &c., shall be heard and determined by the Master, with liberty to either party to appeal to the Court from the Master's order:—Held, that the parties may apply to the Court, where the Master, on such an application, has made no order.

An application being made to the Master to enlarge publication, he was prevented by illness from attending, and made no order. The time for passing publication having expired—

Mr. Koe moved to enlarge publication.

Mr. Stuart objected, that the Court could not entertain the application, as by the 3 & 4 Will. 4. c. 94. s. 13, it is enacted, "That the Master shall hear and determine all applications for enlarging publication." Since that act, the Court can only interfere by way of appeal from the order made by the Master. Here, the Master had not determined the matter, and no order had been made by him.

The 20th order, December 1833, was cited.

The VICE CHANCELLOR.—I cannot comprehend for what useful purpose this application is opposed, because it cannot affect *Mr. Stuart's* client. I think, that it would be a very narrow construction to hold, that the Court could not interfere in this case. If an application be made to the Master, and he makes no order, the not making an order is as much the subject of appeal, as the making an order which is unsatisfactory to the parties. An application was here made to the Master to enlarge publication; the parties were at liberty to make such an application, they attended, and the Master exercised no judgment on the matter; being unwell, he did not attend. Now, it appears to me, that the non-making of an order for such a reason, is as much the subject of appeal as if the Master had attended and had assigned a reason for not making any order. I think it better to give

the same construction, where the Master has made no order, for the reason here stated, as if he had not made an order, because according to his judgment he thought he ought not to make one.

L.C. }
April 28. } LUCAS v. BOND.

Vendor and Purchaser.

*A testator directed his executors to invest a sum of 20,000*l.*, and pay the interest to his wife for life; and after her death to pay 2,000*l.*, part thereof, amongst the children of J. L. living at the death of the widow. The plaintiff, being one of the two children of J. L., put up for sale by public auction what he described to be 1,000*l.* principal money, part of 20,000*l.* principal money invested in consols. The defendant became the purchaser; and the plaintiff, by an indenture, which recited the will, investment, and purchase, assigned 1,000*l.* sterling, part of the legacy of 20,000*l.* At the death of the tenant for life, the 1,000*l.* in consols were worth 1,420*l.*:—Held, on appeal, affirming the decision of the Master of the Rolls, that the defendant was entitled to the whole 1,420*l.**

The circumstances of this case will be found in 6 *Law J. Rep.* (n.s.) *Chanc.* 259. The plaintiff appealed from the decision of the Master of the Rolls.

Mr. Tinney, Mr. G. Richards, and Mr. Malins, for the plaintiff, contended, that, from the use of the word *sterling*, and from the form of the covenants for title, it was clear, that the intention of the plaintiff was to sell, and that of the defendant was to buy the exact sum of 1,000*l.* sterling. That under the covenants, the plaintiff would have been liable to make up any deficiency, had the price of consols fallen, as he covenanted, that the sum of 1,000*l.* should become payable. That the plaintiff, by his first application to the trustees, had shewn what he himself believed to be the nature of the transaction; and that if the legal effect of the assignment was contrary to the intention of both vendor and purchaser, it was a case for equitable relief.

Mr. Wigram and Mr. G. Turner appeared for the respondents; but—

The LORD CHANCELLOR (without hearing them) said, that this was a very clear case. The manifest intention to be collected both from the particulars of sale and from the deed of assignment, was to sell absolutely the whole interest of the plaintiff, and, consequently, the defendant was entitled to the fund in its state of investment. He did not agree that the plaintiff would have been liable to make good 1,000*l.* sterling, in case there had been a deficiency.

As to the costs of the appeal, his Lordship said, he was clearly of opinion, that there was no reasonable ground for the appeal, and he thought the plaintiff was fortunate in not having been ordered to pay costs below. He must, therefore, dismiss this appeal, with costs.

Appeal dismissed, with costs.

M.R. }
April 30. } HOARE v. JOHNSTONE.
HOARE v. CAMPBELL.

Practice.—Evidence.

In an inquiry before the Master, the parties proceeded on affidavit:—Held, that the plaintiff could not use the answer of one defendant, as an affidavit against another co-defendant.

In this case, Mr. Campbell and Mr. Macqueen were two co-defendants, but after the answer of the latter had been put in, the bill was dismissed, as against him. At the hearing, certain inquiries were directed, and in the Master's office the parties agreed to proceed on affidavit, and the Master had permitted the plaintiff to use the answer of Macqueen in the way of an affidavit, as evidence against Campbell. One of the exceptions to the Master's report was on the ground that this evidence had been improperly admitted.

Mr. Pemberton and Mr. Beavan, in support of the exception.

Mr. Kindersley and Mr. Elderton, contra.

The MASTER OF THE ROLLS.—The last of these exceptions which has been argued upon the present occasion, relates to the use which was made of the answer of the defendant, Mr. Macqueen, in the Master's office; and the question is, whether it is legal evi-

dence to be used upon such an occasion. Now, certainly, there is no rule more distinct as to evidence than this, that it ought not only to be evidence in a matter in issue between the parties, but it ought to be the evidence of a person, disinterested, and giving it for the purpose of declaring the truth upon the occasion on which it is adduced. Now, the answer is an answer which is put into the bill filed by the plaintiff against the defendant in the cause, for the purpose of maintaining his own interest as against the plaintiff. It is put in as his defence to the demand made against him by the plaintiff, and states no more than that which, according to the advice he receives, applies to that particular purpose. It is put in for the purpose of promoting his own interest, not for the purpose of declaring the truth as a disinterested witness between two other parties, who are in contest together; and on that ground, and on that ground alone, I am of opinion that the answer is not legal evidence, to be used for the purpose for which it was used in the Master's office.

V.C. }
April 30. } LORD ST. JOHN V. BOUGHTON.

Trust—Limitations—Act 3 & 4 Will. 4. c. 27, Construction of.

What is a sufficient acknowledgment under 3 & 4 Will. 4. c. 27. to prevent a debt charged on land being prejudiced by the lapse of time.

When an estate is devised, subject to the payment of debts, the acknowledgment of the trustee is sufficient to prevent the operation of the statute, and the acknowledgment of the cestui que trust is not essential.

An acknowledgment, signed in initials by an agent of the trustee, held sufficient.

In the year 1802, the testatrix, Lady St. John became bound on a bond for payment of 322*l.* to certain persons now represented by the petitioners.

In 1804, she made her will, by which she directed all her own just debts to be fully paid, and she devised all her plantations in the island of Grenada, which formed the whole of her real estate, to Bennett and Townsend, in fee, upon trust

to sell, and in the first place to discharge the incumbrances affecting the same; and subject thereto, on the trusts thereafter mentioned; and she bequeathed all her personal estate to the aforesaid trustees, upon trust in the first place for the payment and satisfaction of all her debts, and then in the discharge of her legacies; and her residuary real and personal estate, she bequeathed for the benefit of her son, Lord St. John, and his children; and she appointed her trustees and her son executors of her will.

The testatrix died in the year 1805, and her will was afterwards proved by the three executors.

Bennett died in 1814, Lord St. John the son in 1817, and Townsend thus became the sole executor and trustee. The testatrix's estate was, at the time of her death, heavily incumbered; and the debt of the petitioners remaining unpaid, they made application to the trustees for the payment thereof; and, in answer to one of such applications, in October 1811, Townsend stated, "That there was little prospect of her debts being paid for many years;" and, in 1816, one of the petitioners wrote to Townsend, giving him notice of the bonds remaining unpaid, and in 1817 Wollaston again wrote to Townsend, and stated, "That he had been requested to ascertain whether the claim previously made was in proper order, or whether it would be necessary to take any legal steps, in order that the claim might be liquidated;" and, in October in the same year, Townsend wrote in reply, "That the notice formally given was fully sufficient for every legal purpose, and that he hoped in a very few years that her ladyship's debts would be fully paid." In the year 1823, another of the petitioners wrote to Townsend to inquire, when it was probable that the bond debts due to the petitioners would be liquidated; and, in answer to such inquiry, Townsend, by a letter, dated the 1st of March, 1823, said, "Be assured I shall be happy to discharge the bonds of the late Mr. Aubert (being the bonds in question) as soon as it is in my power, and of which I will give you or Mr. Wollaston the earliest notice. Should you visit Clifton, I shall be glad to give you any further information on this subject. A severe attack of gout

in the hand obliges me to employ an amanuensis." This letter concluded thus:—

"I am, Sir, &c.,

"For Thomas Townsend,

"L. T."

On Townsend's death, in 1824, a suit was instituted for the appointment of new trustees of the will of Lady St. John; and the present defendants were appointed new trustees, and the real estates were conveyed to them in August 1826, upon the trusts of the will. At that time, the incumbrances affecting the real estate had not been paid off. A creditors' suit, for the administration of the assets of the testatrix, was subsequently instituted; and the usual decree was made in June 1833. The Master made his report of the debts in November 1836, in which the debt of the petitioners was not included, in consequence of their having neglected to go in, before the day peremptorily fixed by the Master.

After the decree on further directions, the petitioners presented their petition, stating the above circumstances, which were verified by affidavit, and seeking to be allowed to prove their debts against the assets. The question argued was, whether, under the circumstances, the debt was barred by the statute 3 & 4 Will. 4. c. 27.*

Mr. Temple and Mr. W. R. Ellis, for the petitioners, contended, first, that the case was not within the statute, which, they argued, did not apply to cases of trust—*Phillipps v. Munnings* (1): that if the act did apply, the time did not begin to run till after

1826; for, at that time, the incumbrances on the estate had not been paid off, and the first trust was for payment of these incumbrances: that the decree in the creditors' suit was before the passing of the act in question, and the petitioner's claim was under the decree—*Sterndale v. Hankinson* (2). Secondly, that the acknowledgment was sufficient to take the case out of the statute, being made by the sole executor and trustee, and, therefore, that the points which arose in *Putnam v. Bates* (3), and *Atkins v. Tredgold* (4), did not arise. They also cited *Jones v. Scott* (5).

Mr. Barber and Mr. Bacon, contra.—*Phillipps v. Munnings* has no application to this case.

[The VICE CHANCELLOR intimated, that since the statute, trusts were not excepted.]

The acknowledgment is not sufficient, for, in order to take a case out of the statute, it must be signed by the *cestui que trust*, or the party interested—*Fearn v. Lewis* (6); and the signature in this case is not sufficient, not being the signature of the party himself; and the signature "L. T." by initials, is not a signature by a party duly authorized.—*Dickenson v. Hatfield* (7), *Upton v. Hill* (8).

The VICE CHANCELLOR said, that if the acknowledgment by a surviving executor was not sufficient, it would be a great injustice. If, for instance, the *cestuis que trust* were infants, it would be impossible, according to such a doctrine, to give an acknowledgment which would take the case out of the statute; and the result would be, that a suit must, under any circumstances, be instituted, where, from the state of the assets, the debts could not be immediately paid. He considered, that, in this case, there had been an acknowledgment within the statute, and the decisions under Lord Tenterden's act did not apply. A trustee may admit, but such admissions do not im-

* By the 40th section of which act it is enacted, "That after the said 31st of December 1833, no action, suit, or other proceeding shall be brought to recover any sum of money secured by any mortgage judgment of lien or otherwise, charged upon or payable out of any land or rent at law or equity, or any legacy, but within twenty years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given in writing, signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto, or his agent, and in such case no such action, or suit, or proceeding shall be brought but within twenty years after such payment or acknowledgment, or the last of such payments or acknowledgments, if more than one was given."

(1) 2 Myl. & C. 309.

(2) 1 Sim. 393.

(3) 3 Russ. 188.

(4) 2 B. & C. 23; s. c. 1 Law J. Rep. K.B. 288.

(5) 1 Russ. & Myl. 255; since reversed by the House of Lords, August 1838; s. c. 2 Law J. Rep. C.P. 67.

(6) 4 M. & P. 1; s. c. 6 Bing. 349; 4 C. & P. 173; 8 Law J. Rep. C.P. 95.

(7) 5 C. & P. 46; s. c. 8 Law J. Rep. C.P. 95.

(8) 12 Moo. 9.

pose a personal liability to pay. All that the statute required was, that the person who represented the estate should give some acknowledgment.

The petitioners were, therefore, allowed to go in before the Master on the usual terms.

V.C. }
April 21. } RUSSELL v. BUCHANAN.

Practice.—Petition—Costs.

Objections to the Master's report on taxation of costs, are properly taken by petition.

In this case the petitioner, Mr. Buchanan, had been employed as the solicitor of the plaintiff. By the decree, the costs of all parties had been directed to be paid; and the plaintiff, in 1836, ceased to employ the petitioner, who obtained an order for the taxation of his bill of costs. The Master, in the course of the reference, had taken into consideration matters which the petitioner contended he was not authorized in doing, and he therefore presented this petition for liberty to except to the Master's report.

Mr. Knight Bruce and *Mr. Bagshawe* took a preliminary objection to the form in which the petitioner had attempted to question the correctness of the Master's report, contending, that it ought to have been by exception, and not by petition.

Mr. Wakefield, Mr. Jacob, and Mr. H. Clarke, contra, contended, that the petitioner was right in the course he had adopted, and that it had been the constant practice, since the time of Lord Hardwicke, to object to the Master's report as to costs, by petition. The case was argued at great length, and the following cases were referred to—

Skip v. Harwood, Seton's Decrees, 335.

Pitt v. Mackreth, 3 Bro. C.C. 321.

Holbecke v. Sylvester, 6 Ves. 417.

Lucas v. Temple, 9 Ves. 300.

Purcell v. M'Namara, 12 Ves. 166.

Brodie v. Barry, 1 J. & W. 470.

Fenton v. Crickett, 3 Mad. 496.

Ex parte Leigh, 4 Mad. 394.

Shewell v. Jones, 2 S. & S. 170; s. c. 3 Russ. 522; 3 Law J. Rep. Ch. 54.

Chennell v. Martin, 4 Sim. 340; s. c. 9 Law J. Rep. Chanc. 208.

Jenkins v. Briant, 6 Sim. 603; s. c. 3 Law J. Rep. (n.s.) Chanc. 169.

Drever v. Maudesley, 7 Sim. 240; s. c. 4 Law J. Rep. (n.s.) Chanc. 162.

Alsop v. Lord Oxford, 1 Myl. & K. 564; s. c. 2 Law J. Rep. (n.s.) Chanc. 174.

The Attorney General v. Brown, 1 Myl. & K. 567.

2 *Smith's Practice*, p. 338.

And see *Stocken v. Dawson*, 5 Law J. Rep. (n.s.) Chanc. 123.

The VICE CHANCELLOR, after referring to the order made by Lord Hardwicke, in *Skip v. Harwood*, and after adverting to the other cases cited during the argument, said—The cases of *Alsop v. Lord Oxford* and *The Attorney General v. Brown* are of no other importance than that, in the former case, a petition was presented for the obtaining a review of the Master's report on his taxation of costs, and no objection was raised to that mode of proceeding; in the second case, the application was by motion, and Lord Lyndhurst said, that "in his opinion a motion was not the proper course," thereby adopting the argument of the Attorney General, that a petition was the proper course. The objection to the enormous costs in the case of *The Skinners' Company v. the Irish Society*, which was before me, was also by petition (1); and in the paper of petitions, at the very time when the present case came before me, there was a petition for a similar purpose; and it appears to me, that after Lord Hardwicke has expressly made an order on petition, and after so much has been said and laid down by succeeding Judges, asserting that a petition was the proper course, and considering that petitions have been so common for that purpose, I must overrule the objection in this case, and the petition will therefore remain to be heard on the merits.

(1) Vice Chancellor, December 1836, and January 21, 1837.

END OF EASTER TERM, 1838.

CASES ARGUED AND DETERMINED

IN THE

Court of Chancery.

TRINITY TERM, 1 VICTORIA.

M.R. }
April 21; } MACKINNON V. PEACH.
May 31. }

*Will—Construction—Cumulative Legacy
—Dying without Issue.*

Bequest of plate to two legatees, to be divided between them share and share alike, and upon the demise of either without lawful issue, then the share of her dying to go to the other. One of the legatees died in the lifetime of the testator:—Held, that the other was absolutely entitled to the whole.

*A testator having two daughters, gave, by his will, to each of them, an annuity of 200*l.* a year for her separate use; he afterwards expressed himself thus: "believing that 2,200*l.* a year will be sufficient for my dear daughters, together with the use of my house and furniture, I direct the residue to be invested; should the lease and furniture of my house be sold, the yearly income of my daughters, so long as they remain unmarried, is to be made up to 2,500*l.*" One of the daughters afterwards died, and the testator by a codicil, gave to the surviving daughter "a further sum of 100*l.* a year in addition to the 200*l.*, the 300*l.* to be for her separate use; and being most anxious to secure her comfort and happiness," he gave her a*

*further sum of 1,000*l.* for life, for the maintenance of herself, establishment, and family, out of respect to the memory of the testator's wife:—Held, that the gift of the 2,300*l.* was a gift in joint tenancy, and that the surviving daughter was entitled to two legacies of 2,200*l.* a year and 1,000*l.* a year.*

The questions in this case arose upon the construction of the will of Charles Mackinnon, esq. The testator, at the date of his will, had two daughters, the plaintiff and her sister Maria Sophia; and by his will dated the 22nd of March 1831, after giving and devising all his worldly estate or property to his trustees, upon the trusts thereafter mentioned, the testator thus expressed himself: "I request that my plate and plated ware, together with the pearls and other articles in my possession, may be divided between my dear daughters Maria Sophia and Sophia Jane, share and share alike; and upon the demise of either of them without lawful issue, then the share of her so dying shall go to her sister, and failing of my said dear daughters and their lawful issue, the said plate and plated ware, pearls, and other articles, are to be sold, and the proceeds or sale value is to be in the meantime laid out as

a part of my estate in the established parliamentary funds of Great Britain. The lease of my house in Grosvenor Place, together with its furniture and fixtures, are to be sold to the highest bidder, at the option of my daughters, and the proceeds or sale value thereof, is likewise to be laid out in the parliamentary funds, or in freehold lands, as hereinafter mentioned." By the sixth clause of his will, the testator charged his estate, monies, and effects for the sole and separate use and benefit of each of his daughters, independently of her husband, for the term of her natural life, with the sum of 200*l.* sterling yearly, to be settled upon them before marriage, and he directed the said annual sum of 200*l.* should on no account be subject to the controul or disposition, or to the debts or engagements of her husband.

In the seventh clause, he expressed himself thus: "Believing that 2,200*l.* a year will be sufficient for the use of my dear daughters, together with the use of my house and its furniture, I direct the yearly saving or residue of the dividends, interest, or profits or rental of my monies and estates to be yearly or half-yearly laid out in trust in purchasing stock in the parliamentary funds of Great Britain, and the interest or dividends arising from such purchases, are to be also yearly or half-yearly invested in the purchase of government stock, and to become a part of my estate or principal. Should the lease and furniture of my house be sold, the yearly income of my daughters, so long as they remain unmarried, is to be made up to 2,500*l.* a year, payable half-yearly."

In the eighth article, the testator directed his money and effects to be, within five years after his decease, invested in the purchase of two separate and clear indefeasible lands or hereditaments of equal value, or nearly so, to be entailed for ever, upon his two daughters respectively, and upon the sons of their bodies, and the heirs male of such sons. And he directed, that if either of his daughters should die before marriage, or within five years after his demise, only one estate should be purchased; and if either should die without lawful issue, her estate or shares were to go to her surviving sister, and upon the survivor's death, to go to her lawful issue:

and there was a gift over on failure of issue of both daughters.

The daughter Maria died in June 1833, and on the 14th of September 1833, the testator made a codicil to his will, in which he expressed himself as follows:—"I do hereby bequeath to my dear daughter Sophia Jane, in my said will named, the further sum of 100*l.* a year, in addition to the 200*l.* therein stated, which sum of 300*l.* is to be settled upon my said dear daughter, before her marriage, and for her sole and separate use;" he then proceeded as follows:—"Placing every confidence in my said daughter, and being most anxious to secure her comfort and happiness, I also particularly will and desire, that out of the annual rent, interest, and dividends accruing from my estate, monies, and effects, the further sum of 1,000*l.* sterling, be paid to her yearly, during the term of her natural life, for the maintenance of herself, establishment, and family; and her receipt shall be a sufficient discharge for the same; the said sum of 1,000*l.* to be paid half-yearly to my said daughter, out of respect to the memory of my beloved wife, and my angelic daughter Maria." He then desired certain specific articles might be considered as heir looms.

Mr. Pemberton and Mr. Renshaw, for the plaintiff, contended, that the plaintiff, the surviving daughter, was entitled to the plate absolutely, and (it appearing that the income of the testator's estate did not exceed that amount) that she was entitled to two annuities, of 2,200*l.* a year and 1,000*l.* a year.

Mr. Tinney and Mr. Beavan, contra, contended, that the gift of the plate to the daughters, "to be divided between them," created a tenancy in common, and that the gift over, upon the demise of one without lawful issue, was void, as it was to take effect upon an indefinite failure of issue, and that consequently one-half would be undisposed of, and fall into the residue. That if the gift over were void in the first instance, the circumstance of the death of one of the daughters in the testator's lifetime, would not make it good. They also contended, that the annuities to the plaintiff were substitutional, and not cumulative. That the gift of the 2,200*l.* to the daughters, was by implication only, and could

not be construed as a joint gift, so as to survive to the plaintiff: that on the construction of the will taken alone, each of the daughters would be entitled to half of the 2,200*l.* a year, of which 200*l.* a year was to be settled for their separate use, and consequently, that each of the daughters would, taking under the will alone, be entitled to 100*l.* a year for her separate use, and a further annuity of 900*l.* a year, making in the whole 1,100*l.* a year for each. That the effect of the codicil was to increase the 200*l.* a year to 300*l.* a year for her separate use, and to increase the 900*l.* a year to 1,000*l.* a year, so that on the whole the plaintiff was entitled to 1,200*l.* a year only.

Mr. Richards, for trustees.

Mr. Pemberton, in reply, contended, that as to the plate, the will speaking, not from its date, but at the death of the testator, when one of the daughters had died without issue, the gift over would take effect, and if not, then that it was undisposed of by the will, and would belong to the plaintiff as sole next-of-kin of the testator. That the legacies being different in amount, and being given for a different motive, and as "further sums," were cumulative.

THE MASTER OF THE ROLLS.—In this case, two questions arising upon the construction of the will of *Mr. Charles MacKinnon*, were reserved for consideration: first, whether the plaintiff was entitled to the share of plate, and certain specific articles which were in the first instance bequeathed to her sister; and secondly, what amount of income the plaintiff was entitled to receive out of the annual interest and dividends of the testator's estate. [His Lordship after stating the terms of the gift of the plate and other articles, proceeded:]—The gift is to two, to be divided between them, share and share alike, and if both had survived the testator, they would have been entitled as tenants in common. As one died in the lifetime of the testator, her share in one sense lapsed; it lapsed as to her, and could not be claimed by her representatives. But in the event of either daughter dying without lawful issue, (and in this case the deceased daughter died unmarried,) her share is given to her sister, that is, to the survivor of the two daugh-

ters; and, I am of opinion, that the circumstance of the deceased daughter having died in the lifetime of the testator, does not prevent the gift over to her sister taking effect; and consequently the plaintiff is now entitled to the whole of the plate, plated ware, and other articles comprised in the clause of the will I have referred to. And for this conclusion, *Northey v. Burbage* (1), *Willing v. Baine* (2), *Humphries v. Howes* (3), and other cases, are a sufficient authority.

[His Lordship read the sixth, seventh, and eighth clauses, and proceeded:]—

Although, in the last clause, the testator has contemplated the event of one daughter dying within five years after his death, that is, within the time during which the accumulations of income were to be made, he has not in his will expressly stated what income the surviving daughter was to have during that period; and upon the will, it appears to me, that during the five years, he intended the two daughters and the survivor of them to have an income of 2,200*l.* a year, together with the house, or an income of 2,500*l.* a year without the house. At the end of five years, a distinct estate was to be purchased for each daughter and her issue, and on her marriage, a separate income of 200*l.* a year was to be secured to her; many contingencies might have occurred which are not provided for; but, in this state of things, one of the daughters died, and in his codicil he has first stated, that the separate income to be secured to the plaintiff, the surviving daughter, on her marriage, should be increased from 200*l.* to 300*l.* a year, and then he proceeds, "Placing every confidence," &c.—[His Lordship here stated the latter part of the codicil.] It has been suggested, that the 1,000*l.* thus given by the codicil, was intended as a substitution for the provision made by the will for the two daughters, and that the expression, "further sum of 1,000*l.*," meant a sum in addition to the 300*l.*, directed to be secured to the separate use of the plaintiff on her marriage. It does not appear to me, the words admit of this interpretation. I think, the

(1) *Precedents in Chancery*, 471.

(2) 3 P. Wms. 113.

(3) 1 Russ. & Myl. 639; s.c. 8 Law J. Rep. Chanc. 165.

sum directed to be secured for the separate use of the daughter, is to be secured in reference to a marriage in contemplation, and by arrangement to be made before the marriage, and that in the meantime it remains part of the general income, or of the sums given or intended for the maintenance of the daughter before the marriage. The annual sum of 2,200*l.* was intended by the will for the maintenance of the two daughters while unmarried; it was given in terms to make it a joint interest or benefit: and in one event contemplated by the testator, the death of a daughter within five years, he has in his will shewn no intention to reduce it, and in the codicil he introduced a gift of a further sum of 1,000*l.* to his surviving daughter, for the maintenance of herself, establishment, and family, by words which express his confidence in her, and his anxiety to secure her comfort; and he subjoins to them, words by which he attributes this further provision to respect for the memory of his deceased wife and daughter.

There is a considerable difficulty in construing this will and codicil in a manner that is quite satisfactory. On the whole, it appears to me, the effect is to give to the plaintiff, out of the income of the testator's property, 1,000*l.* a year, in addition to the 2,200*l.* a year, intended for herself and sister, if the sister had survived; that if there should be any surplus after payment of the two annual sums of 2,200*l.* and 1,000*l.*, the same was to be accumulated; that the testator's estate, together with the accumulation, was, at the end of five years from his death, to be invested in the purchase of lands to be settled as in the will mentioned; and, that the plaintiff from the end of five years, will be entitled to the whole income, and provision is to be made on her marriage, for securing to her 300*l.* a year for her separate use. Although the testator has directed the further sum of 1,000*l.* to be paid to her yearly during the term of her natural life, and her receipt to be a sufficient discharge for the same; yet it does not appear to me to be consistent with the other provisions, that this is to be made a separate payment after the expiration of five years, or after the marriage of the plaintiff. After the expiration of five years, the investment

which gives the plaintiff the whole income, is to be made.

Note.—All the cases on the subject of cumulative and substitutional legacies, will be found chronologically arranged in a note to *Wray v. Field*, 6 Mad. 303. The cases which have since occurred, are, *Mackenzie v. Mackenzie*, 2 Russ. 262; *Wray v. Field*, *ibid.* 257; *Lord v. Sutcliffe*, 2 Sim. 273; *Watson v. Reed*, 5 Sim. 431; *Graves v. Hicks*, 6 Sim. 391, s. c. 4 Law J. Rep. (N.S.) Chanc. 239; *Brine v. Ferrier*, 7 Sim. 549; *The Attorney General v. George*, 8 Sim. 138, s. c. 5 Law J. Rep. (N.S.) Chanc. 330; *Guy v. Sharp*, 1 Myl. & K. 589; *Manning v. Theisger*, 3 Myl. & K. 29, s. c. 4 Law J. Rep. (N.S.) Chanc. 285.

L.C. } ATTORNEY GENERAL v.
May 26. } VIGORS.

Costs—Taxation—Counsel.

Under a reference to the Master to tax costs as between solicitor and client, he disallowed the fees to two out of five counsel, who appeared at the hearing:—Held, that the Master was right.

At the hearing of this cause, three counsel within the bar, and two juniors, appeared on the same side. Under a reference to tax costs as between solicitor and client, the Master refused to allow the fees paid to the two juniors, and a petition was presented against the Master's decision in that respect.

Mr. Knight Bruce, in support of the petition.—The case was one of great difficulty, and there was a great interest at stake. The junior counsel were indispensable; and the result of the cause depended as much upon them as upon the leaders. The question is, can the solicitor recover these fees from his client? if so, they ought to be allowed in costs as between solicitor and client.

The LORD CHANCELLOR.—I do not take that view of it. The parties are favoured in being allowed the fees of three leading counsel. Have fees to five counsel ever been allowed in any case? It is impossible for me to say, that the Master was wrong.

Petition dismissed, with costs.

M.R. }
May 24, 31. } PERRY v. WALKER.

Pauper Cause—Notice of Motion.

It is not necessary that the notice of motion of a pauper should be signed by his six clerk.

The plaintiff, in this case, sued *in forma pauperis*; and having personally opened a motion—

Mr. G. Richards objected, that he could not be heard, as the notice of motion had not been signed by his clerk in court. He cited *Gardiner v.* — (1).

The MASTER OF THE ROLLS ordered the motion to stand over, in order to inquire as to the practice.

May 31.—The MASTER OF THE ROLLS said, that he had inquired into the practice; that as there had never been any general order on the subject, the plaintiff was entitled to be heard on his notice of motion.

M.R. }
June 9; July 9. } DAVIDSON v. THE MAR-
CHIONESS OF HASTINGS.

Practice.—Service of Process.

Service of process at the house of a defendant in England, who was at the time residing in Scotland, held good service.

Personal service of the order nisi for a sequestration on the defendant in Scotland, is good service, on which to found the order for a sequestration.

The bill in this case was filed on the 15th of December 1837, and on the 18th of January 1838, a clerk of the plaintiff's solicitor, served the letter missive, and an office copy of the bill, "by delivering to and leaving with the servant of the defendant, at her dwelling-house, situate at Kensington, in the county of Middlesex, the original letter missive, the copy of the petition, and order thereon, and the office copy bill, and, at the same time, producing to the servant, the original petition and order thereon;" the defendant not having

entered her appearance to the bill, the clerk, on the 5th of February 1838, served her with a subpoena, by delivering to and leaving with the defendant's servant, at her dwelling-house at Kensington aforesaid, a true copy of the said subpoena.

On affidavit of this service, an order was made on the 24th of February 1838, for a sequestration of the defendant's estates, until she should appear to the bill, and the Court should make order to the contrary, "unless the said defendant, having personal notice thereof, should, within eight days after such notice, shew unto this Court good cause to the contrary. The defendant being resident in Scotland, the order nisi, for a sequestration, was personally served upon her, at her residence in Ayrshire, on the 21st of March; and this service having been verified by affidavit, the order nisi for a sequestration was, on the 18th of April, made absolute, and the sequestration issued (1).

Mr. Kindersley and Mr. G. Richards now moved to set aside the orders of the 24th of February and 18th of April, for irregularity, with costs.

Mr. Pemberton objected, that the defendant being in contempt, and not having appeared, could not be heard without first entering a conditional appearance—*Daniel's Practice*, 667.

The MASTER OF THE ROLLS, after consulting the registrar, said, he conceived the practice to be to enter a conditional appearance with the registrar, which would not prejudice the defendant, if this application succeeded.

The motion stood over, and came on on a subsequent day.

The application was supported by the affidavit of the defendant, which was as follows:—

"That she left England for Loudoun Castle, in the county of Ayr, in Scotland, on the 11th of September 1837; that Loudoun Castle aforesaid was her residence; and that she had continued to reside at Loudoun Castle aforesaid, without intermission, from the said 11th of September 1837 to the time of swearing her affidavit;

(1) 17 Ves. 387.

(1) See *ante*, p. 186.

that she had no present intention of returning to England, but permanently to reside in Scotland; that she did not leave England to avoid the service of the process of this Honourable Court, and was, according to the law of Scotland, a domiciled Scotchwoman."

On the other hand, an affidavit was made by the clerk of the plaintiff's solicitor, who stated, "that he, on the 22nd of December 1837, attended at Noel House, Kensington, in the county of Middlesex, the residence of the defendant, the Marchioness Dowager of Hastings, when he saw a servant of the defendant at the house, who stated, that such house was the residence of the defendant, who was then in Scotland, where she would remain for some months; that on the 18th day of January last he again attended at Noel House, when he there saw a servant of the defendant, who stated that the said house was the residence of the defendant, the Marchioness Dowager of Hastings, who was in Scotland, but was expected to return in the month of March then next; and the servant then also stated, that he had orders to forward all letters and enclosures to the defendant, and would so forward the letters missive, which deponent then left; that on the 5th day of February last he attended at Noel House aforesaid, and then saw there another servant of the defendant, who also informed him that the said house was the residence of the defendant, who was then in Scotland, where she usually went for some months in the year, and that she was expected to return, but not until after the month of March then next, as she was then unwell; and that the papers previously left by him, the deponent, meaning thereby the said letter missive, and the office copy bill, had been forwarded to the defendant; he thereupon left, with the servant last named, at the house, the subpoena mentioned in his affidavit, sworn in this cause on the 23rd of February last, and such servant said that the subpoena would be forwarded that day or the next to the defendant, the Marchioness Dowager of Hastings."

Mr. Kindersley and *Mr. G. Richards* contended, that the service of the letter missive and subpoena at Kensington was not

good service, that not being at the time the habitual residence of the defendant; and secondly, that the service of the order *nisi*, out of the jurisdiction, was also irregular, no special order having been obtained for that purpose under the 2 & 3 Will. 4. c. 33.

Mr. Pemberton, contra, submitted, that service at the defendant's house, when upon her own servant, was valid; and secondly, that the object of the order *nisi* was merely to give personal notice to the defendant, and that the terms of this order had been strictly complied with.

See *Thomas v. the Earl of Jersey*, 2 Myl. & K. 398; and

Robinson v. Elton, 4 Law J. Rep. (n.s.) Chanc. 197.

Hasluck v. Stewart, 6 Sim. 321.

M^r Master v. Lomax, 2 M. & K. 32; s. c. 4 Law J. Rep. (n.s.) Chanc. 28.

Cameron v. Cameron, *ibid.* 289; s. c. *ibid.*

Godson v. Cook, 7 Sim. 519; s. c. 6 Law J. Rep. (n.s.) Chanc. 329.

THE MASTER OF THE ROLLS.—This was an application to discharge an order for a sequestration issued against the Marchioness of Hastings. [His Lordship detailed the circumstances.] There are two irregularities alleged: first, in the service of the subpoena; and secondly, in the service of the order *nisi*. If the first be irregular, all the subsequent proceedings are irregular, and ought to be set aside; but any irregularity in the service of the order *nisi*, would only invalidate the order absolute. Lady Hastings has made an affidavit; she says—[His Lordship stated it].—This affidavit is not contradicted, but it is extraordinary that she should have been advised to make it; she does not deny the facts stated on the part of the plaintiff, that Noel House belonged to her, that her servants lived there, that the information they gave to the clerk was true, that she actually received the letter missive, &c.; all these facts are uncontroverted by the affidavit of the defendant.

By the general rules (2), a subpoena is well served by leaving a copy thereof, with the indorsement, at the house of the

(2) 5th Order, December 1833.

defendant, and producing the original subpoena; and I am of opinion, that in this case the service of the subpoena was regular; and I have been informed, that it has been the constant practice to issue process of contempt on such service. The order nisi was therefore regularly obtained, and by the terms of it, it was to be made absolute, unless the defendant having personal notice thereof, should, within a limited time, shew cause to the contrary. In this case, the defendant had personal notice of the order, and did not shew cause why it should not be made absolute; but the objection is, that she was served with notice at a place out of the jurisdiction of the Court. In cases where a defendant is out of the jurisdiction, the plaintiff is not bound to go out of the jurisdiction for the purpose of giving formal notice of the order, but, that the ends of justice should not be defeated, the Court will order service at the dwelling-house of the defendant to be good service; and if in this case the plaintiff had applied for substituted service, it would have been granted (3). The defendant having a dwelling-house within the jurisdiction, but being temporarily absent, there is every probability that a notice given there would be communicated to the defendant; and the Court may attribute to the party personal knowledge of the process; but where there is really personal notice, it may be asked, what would be the advantage of resorting to substituted service? I thought that authorities might be found. Service of an order nisi for sequestration on a defendant, the object of which was to give notice, differed materially from the service of writs and process, to which the act 2 & 3 Will. 4. c. 336. applied. Under all the circumstances, I think the service of the order nisi was not irregular; but, considering that no authority on this point could be found, I am desirous of affording the defendant an opportunity of appearing; and therefore,

(3) The personal service of the order nisi for a sequestration may be dispensed with, if the defendant keep within his house, or cannot be served personally, by application to the Court, grounded upon an affidavit stating the fact, which, if it be deemed satisfactory, service by leaving the order nisi at defendant's dwelling-house will be substituted instead of personal service.—Hinde's Chanc. Prac. p. 96.

upon payment of costs, and putting in her appearance, the further execution of the writ may be stayed.

M.R. }
July 8. } MACDONALD v. BRYCE.

Will—Construction—Maintenance.

A testator gave the residue to an infant on his coming of age, and failing him over; and he directed the income to be applied for the maintenance, education, and benefit of the infant, as his executors should judge most advantageous for him. The infant died under twenty-one:—Held, that he was not entitled to the whole income which accrued during his life, but to so much only, as had been applied for his benefit in his lifetime.

This case will be found reported, *ante*, p. 173. The terms of the will of the testator, Robert Shawe, which are applicable to the point reported, were as follows:—
“Lastly, the residue of my property I will and bequeath unto Robert Shawe, the eldest son of the aforementioned Peter Shawe, for his sole use and benefit, upon the said Robert Shawe's coming of age; failing him, to the next male child procreate of the body of the aforesaid Peter Shawe lawfully begotten, who shall attain the age of twenty-one years; failing the male children of the said Peter Shawe lawfully begotten, to the aforementioned legatees, or the survivor or survivors of them in equal proportions—namely, Misses Anne Margaret and Elizabeth Macpherson, and Mrs. Christy Grant, Mrs. Isabella Macdonald, Mrs. Mary Macdonald, and Mrs. Anny Maclean, all daughters of the aforementioned Lewis Macpherson, Esq., of Dalraddy, North Britain, their respective shares to be at their free will and disposal: and whereas, the aforesaid Robert Shawe, the residuary legatee named by this will, is now under age, I do constitute and appoint my aforesaid executors, Francis Duncan and Alexander Bryce, and the survivor of them, guardians and guardian of the said child during his minority; and my will is, and I do direct, that they do apply the dividends arising from the property be-
longing to me, which may remain after

paying the different legacies, and setting apart a sufficient sum for the payment of the annuities hereinbefore bequeathed, together with my funeral expenses (my debts being all paid) *to the maintenance, education, and benefit of the said child, as they shall judge most advantageous for him*; and in the event of his death before his reaching the age of twenty-one years, I do also constitute and appoint the said Francis Duncan and Alexander Bryce, and the survivor of them, to be guardians and guardian of the male child lawfully begotten of the said aforesaid Peter Shawe, who may succeed according to the before-recited disposition in this my last will and testament, with power to the said Francis Duncan and Alexander Bryce, and the survivor of them, as guardians and guardian, to apply the dividends aforesaid to the purposes above mentioned."

The testator died in April 1812, and Robert Shawe, the son of Peter, died in August 1814, an infant of the age of eight years. It appeared, that the income of the residue which accrued during the life of Robert Shawe the infant, amounted to 1,203*l.*, of which, 186*l.* only had been applied towards his maintenance. A claim was now made on the part of the personal representatives of Robert Shawe to the surplus income which accrued between the death of the testator and that of Robert Shawe the legatee: this claim was resisted by the residuary legatees of the testator.

Mr. Stuart, for some of the next-of-kin of the testator, contended, that there was no absolute gift of the dividends to the infant, but a direction only to apply what might be necessary for his maintenance; and that the remainder would only have vested with the residuary estate in the infant on attaining twenty-one; and, secondly, that if the legatees were entitled to the interest, it should be computed from one year from the death of the testator only—*Douglas v. Congreve* (1).

Mr. Tinney, *Mr. Mylne*, and *Mr. Romilly*, for parties in the same interest.

Mr. Spurrer, for the executor.

Mr. Koe, for the representatives of the infant, Robert Shawe, contended, that during his life, from the time of the death of the testator, he was absolutely entitled to the dividends on the residue of the estate. That a vested interest in the capital was given, subject only to be divested in the event of Robert Shawe dying under twenty-one. That there was an express direction to apply the dividends on the residue for the *benefit* of this child, which was equivalent to a gift of the income. He contended also, that the interest was payable immediately on the death of the testator, and was not suspended until a year after his decease: he cited *Deane v. Test* (2).

Mr. Stuart, in reply.

THE MASTER OF THE ROLLS.—I do not think I need trouble you on the construction of this will. Robert Stewart was not entitled to more than what was actually applied for his maintenance, education, and benefit, recollecting that this was a gift of the residue, and that the testator intended to give the residue to Robert Shawe on his attaining twenty-one. There is a gift to Robert Shawe on his attaining the age of twenty-one; and there is a direction to apply the dividends arising from the property (after the necessary deductions made from the property) for the maintenance, education, and benefit of Robert Shawe. As to so much of the dividends not so applied, it constituted a portion of the residue, to which Robert Shawe would have been entitled if he had attained twenty-one; but the testator says, failing this, it is to go to the next male child of Peter Shawe, and so on to the next, with limitations over. I think, on the peculiar wording of this will, that the dividends which were not applied for the maintenance, education, and benefit of the child, or which ought not properly to have been applied for the maintenance, education, and benefit of the child, (for no doubt the executors could not deprive him of any benefit which he ought to have,) constituted a portion of the residue, and are subject to the gift over of the residue.

(2) 9 Ves. 146.

(1) 1 Keen, 424; s.c. 6 Law J. Rep. (N.S.) Chanc. 51.

M.R. }
May 24. } CANE v. MARTIN.

V.C. }
June 7. } NICHOLSON v. KNAPP.

New Orders, 1837—Practice—Demurrer.

The suit had been commenced previous to the orders of 1837; one of the defendants afterwards filed a demurrer, and set it down at the Rolls:—Held, that the orders of 1837 did not give to the plaintiff such a right of selecting his court, as to render the proceeding of the defendant irregular.

This bill had been filed previous to the orders of 1837 coming into operation, but no special order on merits had been made. One of the defendants had lately filed a demurrer to the bill, and set it down at the Rolls.

Mr. Elderton, on behalf of the plaintiff, now moved to discharge that order for irregularity, and to take the demurrer off the file, contending, that if the demurrer were heard at the Rolls, it would prevent the plaintiff setting down his cause to be heard before the Vice Chancellor; and that it was not intended by the new orders to take away from the plaintiff his right of selecting his court. That the defendant ought therefore to have applied to the plaintiff, to elect in which court he would have his cause heard; and on the plaintiff making default, the defendant might then have applied to the Court.

Mr. Pemberton, for the defendant, was not called on by—

The MASTER OF THE ROLLS, who said, he did not see any reason for discharging the order; it was the same as before the new orders came into operation, when the defendant might set down the demurrer in which court he pleased. The new orders did not affect that right; but ordered, that when the case had been heard on demurrer, or on the merits, a party should not afterwards be at liberty to carry the cause to a Judge who was unacquainted with the circumstances of the case.

Practice.—Injunction—Benefice—Lapse.

Where the subject of litigation was the next presentation to a living then vacant, the bishop in whose diocese it was situate was restrained from instituting, &c., and from taking advantage of any lapse pending the proceedings.

On an application for a special injunction, the answer of the defendant and the affidavits in support of the application were filed the same day:—Held, that the affidavits were admissible in support of the motion.

The object of this suit was to obtain a decree for the specific performance of a contract, for the sale of the right of next presentation to a living, the performance of which was resisted by the vendor, the living having in the meantime become vacant by the death of the incumbent.

Mr. Knight Bruce and *Mr. Beavan*, on behalf of the plaintiff, moved for a special injunction to restrain the vendor from presenting any clerk to the rectory, other than the clerk of the plaintiff, and to restrain the bishop "from instituting, collating, or causing to be inducted any clerk other than the clerk to be nominated by the plaintiff to the said rectory or church, and from taking advantage of any lapse pending the proceedings in this suit."

The affidavits in support of the motion, and the defendant's answer, having been filed the same day,—

Mr. Jacob and *Mr. James Parker* objected to the affidavits being used; but—

The VICE CHANCELLOR said, that he could not give priority to either; and that the affidavits might, consequently, be used.

Mr. Flather, on behalf of the bishop, in whose diocese the living was situated, objected to that part of the motion which sought to restrain the bishop from taking advantage of any lapse, urging that the Court ought not to interfere with his legal rights in case of a lapse; but—

The VICE CHANCELLOR said, it had always been a matter of course to restrain

the bishop pending the litigation; and he granted the injunction in the terms of the motion.

Notes—In the case of *Barbour v. the Duke of Marlborough*, at the Rolls, 22nd June 1838, Mr. Flather raised the same point; but Lord Langdale overruled it, and enjoined the Bishop of Oxford from instituting any person except the nominee of the plaintiff to the living of Woodstock.

Re Middleton 51 L.J. Ch. 274.

M.R.

June 6;

July 9, 10.

— } EYRE v. MARSDEN.

Thellusson Act—Construction—Conversion—Will—Costs—Heir-at-law and Next-of-kin—Accruer.

The *Thellusson Act*, which prohibits the accumulation of property beyond a certain period, does not operate to alter any disposition made by a testator, except only his direction to accumulate. Striking that out, everything else is left as before; and all the other directions in the will as to the time of payment, the substitution of interest, or any contingencies, take effect unaltered by the statute.

A testator gave certain annuities out of his residuary estate to his three children, "and requested the surplus of the annual income to be applied in accumulation of the capital of his property, for the benefit of his grandchildren;" and after the death of the survivor of his three children, he directed the residue to be divided amongst his grandchildren then living:—Held, that the direction for accumulation, exceeding twenty-one years from the testator's death, was void under the 1st section of the *Thellusson Act*, and that it did not come within the exception of the 2nd section:—Held also, that the void accumulations did not belong to the residuary legatees, but that they were undisposed of.

The testator having directed his trustees to convert his real and personal estate into money, when they should think proper, and to accumulate the income:—Held, that such part of the accumulations arising from the converted real estate, as was void under the *Thellusson Act*, belonged to the heir-at-law, and not to the next-of-kin.

A gift over amongst the survivors of a

class of individuals,—Held, under the circumstances, to apply not only to original, but accrued shares of a fund.

A suit to administer his estate having been rendered necessary by the form of the will of a testator, who had blended his real and personal estate into one common fund, the costs of the suit were directed to be paid pro rata, by the heir and personal representatives, out of accumulations devolved to them, in consequence of the directions to accumulate having partially exceeded the limits prescribed by the statute.

Joseph Wildsmith, the testator in the cause, by his will, dated the 11th of January 1804, after giving a life interest in a part of his estates to his servant, Mary Nicholson, gave to his trustees all his freehold and leasehold land, and all other estates whatsoever, "upon trust that they, his said trustees, or the survivors or survivor of them, or the heirs, executors, or administrators of such survivor, should at any time or times after his decease, when they or any of them should think proper, sell, dispose of, and convert into money, all or any part of his real and personal estate, and invest and place out upon security the money arising therefrom, after payment of his debts, funeral and testamentary expenses, and the costs and charges attending the execution of his said will, and should receive the rents, interest, and annual produce of his said real and personal estate, until the sale thereof, for the purpose of raising the annuity and weekly payments thereafter by him bequeathed;" and after giving a power to his trustees, if they thought fit, of carrying on his business in manner thereafter mentioned, he gave some directions for carrying on his trade, and gave a weekly sum of one guinea to each of his sons, Joseph and Benjamin, for their lives, and an annual sum of 54l. 12s. to his daughter, Elizabeth Eyre, which annual and weekly payments he directed to be made by his trustees, out of the rents, issues, and annual profits of the estates; and he then proceeded as follows: "The surplus of such annual income, (if any,) I request, may be applied in accumulation of the capital of my property, for the benefit of my grandchildren,

and from and after the death of my said children, Joseph Wildsmith, Benjamin Wildsmith the elder, and Elizabeth Eyre, and the longest liver of them, upon trust that they, my said trustees, or the survivors or survivor of them, or the executors or administrators of such survivor, do and shall sell and convert into money all such part of my estate and effects as shall not consist of specie, and from time to time call in and receive the money, which shall be placed out upon security as aforesaid, and pay, distribute, and divide the same, after deducting the expenses of performing this my will, and the legacies hereinafter mentioned, unto and amongst all and every my grandchildren who shall be living at the time of my decease, equally share and share alike, save and except the share of Francis Maceroni, one of the children of my late daughter, Mary Ann Maceroni, deceased, one moiety or half-part of whose share of my estate and effects, I give and bequeath to his brother, George Maceroni, in consideration of the benefit derived by the said Francis Maceroni from the will of my late brother, Benjamin Wildsmith. And I do will and direct, that the shares of such of my said grandchildren as shall be under the age of twenty-one years, at the time of the decease of the survivor or longest liver of my said children, shall be placed out or continue upon security, and the interest thereof shall be applied in the maintenance of my infant grandchildren during their respective minorities; and in case any of my said grandchildren shall die before his or their share or shares of my estate and effects shall become payable by virtue of this my will, leaving lawful issue, then such issue shall be entitled to the share or shares which his, her, or their deceased parent or parents would have been entitled to, if then living; but in case of the death of any of my said grandchildren without leaving issue, before he, she, or they shall become entitled to receive his, her, or their share or respective shares of my said estate and effects, in manner aforesaid, then I give and bequeath the share or shares of such deceased grandchild or grandchildren unto and equally among my surviving grandchildren, to be paid at the same time and in the same manner as before mentioned, touching the

original share or shares of my said grandchildren.

The testator died on the 19th of October 1804. He had ten grandchildren then living, two of them were the children of Mary Ann Maceroni, a deceased child of the testator. The parents of the other eight were living, and were the children of the testator's children, Joseph, Benjamin and Elizabeth, to whom he had given the weekly payments and annuity by his will. Elizabeth Eyre was the survivor of the testator's children, and she died on the 9th of April 1834. Of the ten grandchildren living at the testator's death, five were living at the death of Elizabeth Eyre, and were now living—namely, Francis Maceroni and George Maceroni, Mary Ann Smith, John Peter Wildsmith, and James Eyre. The other five—namely, Mary Ann Cousins, Catherine Wildsmith, Benjamin Wildsmith, Joseph Wildsmith, and Elizabeth Rumsay, died in the lifetime of the daughter Elizabeth. One of them, Catherine Wildsmith, died without leaving issue living at the time of her own death, and the remaining two—namely, Mary Ann Cousins and Elizabeth Rumsay, died leaving issue, namely, Theresa Maria Cousins and Thomas Ramsay, who were living when they respectively died, but not living at the death of the testator's daughter Elizabeth.

Several questions were discussed in this case:—first, whether the directions to accumulate beyond twenty-one years, after the death of the testator, was or was not void under the Thellusson Act (1);—se-

(1) The 39 & 40 Geo. 3. c. 98. enacts, "That no person or persons shall after the passing of this Act, by any deed or deeds, surrender or surrenders, will, codicil, or otherwise sever, settle or dispose of any real or personal property, so and in such manner that the rents, issues, profits, or produce thereof shall be wholly or partially accumulated for any longer term than the life or lives of any such grantor or grantors, settlor or settlors, or the term of twenty-one years from the death of any such grantor, settlor, deviser, or testator, or during the minority or respective minorities of any person or persons who shall be living, or in *ventre sa mere* at the time of the death of such grantor, deviser, or testator, or during the minority or respective minorities only of any person or persons who, under the uses or trusts of the deed, surrender, will, or other assurances, directing such accumulations, would, for the time being, if of full age, be entitled unto the rents, issues, and profits, or the interest, dividends, or annual produce, so directed to be accumulated;

condly, if it was void, then, whether under the terms of this act, which directs the accumulation to go and be received by the persons who would be entitled thereto, if the accumulation had not been directed, the void accumulations belonged to the residuary legatee, or were undisposed of by the will; and if so, then thirdly, whether by the directions to the trustees to sell, there had been a conversion of the real into personal estate; or in other words, whether that part of the void accumulations which had arisen from the real estate belonged to the next-of-kin, or whether it belonged to the testator's heir-at-law;—fourthly, whether the share of Catherine Wildsmith, who died under age, in the lifetime of Elizabeth Eyre, was distributable amongst all the other grandchildren and their representatives who survived her, or amongst such of them only as survived Mrs. Eyre;—fifthly, whether the great-grandchildren, Thomas Rumsay and Theresa Maria Cousins, who did not survive Mrs. Eyre, were entitled to stand in the place of their parents;—sixthly, whether that part of the share of Mrs. Cousins, which accrued to Catherine Wildsmith, passed to her personal representative on her death, or went over together with her original share;—seventhly, whether the gift of half of the share of Francis Maceroni to George applied to his accrued share, as well as to his original share.

Mr. Kindersley and *Mr. Bichner*, for the plaintiff, Mary Ann Smith, contended, that the accumulations beyond twenty-one years

were void under the 1st section of the act in question, and that the case did not come within the exception of the 2nd section; that such accumulations were undisposed of; that there having been a conversion of the realty into personal estate, by the directions to sell, the whole belonged to the testator's next-of-kin (2); and, that the accrued share was subject to be divested in the same way as the original share.

Mr. Trelove and *Mr. Tillotson*, for Mary Ann Smith, the heir-at-law, contended, that there has been no conversion of the real estate (3); and they claimed on her behalf such part of the void accumulations as had arisen from the real estate.

Mr. G. Richards and *Mr. O. Anderdon*, for George Maceroni.

Mr. Duckworth, for the assignees of Benjamin Wildsmith.

Mr. Hall, for the personal representatives of Elizabeth Rumsay.

Mr. Spence, *Mr. Booth*, and *Mr. Wilcox*, for parties claiming under Joseph Wildsmith the younger.

Mr. Pemberton and *Mr. K. Parker*, for the children of Benjamin Wildsmith the younger, contended, that the act ought to be construed strictly, and that this case coming within the exception of the 2nd section, the directions for accumulation were valid; that if invalid beyond the period of twenty-one years, then, that the statute accelerated the enjoyment.

Mr. Temple, for J. P. Wildsmith.

Mr. Agar and *Mr. Campbell*, for other parties.

(2) The cases on the Thellusson Act, arranged according to their dates, are as follows:

Nov. 1803, *Griffiths v. Vere*, 9 Ves. 127.

Mar. 1806, *Longdon v. Simson*, 12 Ves. 295.

May 1813, *Lord Southampton v. the Marquis of Hertford*, 2 Ves. & Bea. 54.

Feb. 1817, *Leake v. Robinson*, 8 Mer. 389.

July 1819, *Haley v. Bannister*, 4 Mad. 275.

Apr. 1820, *Marshall v. Holloway*, 2 Swanst. 438.

Dec. 1822, *Bacon v. Proctor*, 1 Turn. & Russ. 31.

Mar. 1828, *Palmer v. Holdford*, 4 Russ. 403; s.c. 6 Law J. Rep. Chanc. 104.

June 1835, *Crawley v. Crawley*, 7 Sim. 487; s.c. 4 Law J. Rep. (N.S.) Chanc. 265.

Feb. 1836, *Shaw v. Rhodes*, 1 M. & Cr. 135.

Mar. 26, 1838, *M'Donald v. Brice*, 2 Keen, 276, s. c. ante, p. 173.

Mar. 31, 1838, *O'Neill v. Lucas*, 2 Keen, 315.

See also 10 Jarman's Bythewood, 65; and Preston's note in Farne's Conting. Rem. p. 538.

(3) See also the cases collected in Cogan v. Stephens, 5 Law J. Rep. (N.S.) Chanc. 17.

and in every case where any accumulation shall be directed otherwise than as aforesaid, such directions shall be null and void, and the rents, issues, profits, and produce of such property so directed to be accumulated, shall, so long as the same shall be directed to be accumulated, contrary to the provisions of this Act, go to and be received by such person or persons as would have been entitled thereto if such accumulation had not been directed."

Section 2. "Provided always and be it enacted, that nothing in the Act contained shall extend to any provision for payment of debts of any grantor, settlor, or devisor, or other person or persons, or to any provision for raising portions for any child or children of any grantor, settlor, or devisor, or any child or children of any person taking any interest under any such conveyance, settlement, or devise, or to any direction touching the produce of timber or wood upon any lands or tenements, but that all such provisions shall and may be made and given as if this Act had not passed."

Mr. Kindersley, in reply.

On the point of accruer, the following cases were cited:—

- Crowder v. Stone*, 3 Russ. 217.
2 Roper's Legacies, 358.
Pain v. Benson, 3 Atk. 78.
Worledge v. Churchill, 3 Bro. C.C. 465.
Skrymsher v. Northcote, 1 Swanst. 566.
Cripps v. Wolcott, 4 Mad. 11.
Barker v. Lea, Turn. & Russ. 413.
Pearson v. Stephen, 5 Bli. n.s. 208.
Pope v. Whitcombe, 3 Russ. 124.
Hoghton v. Whitegrave, 1 Jac. & W. 146.
Bright v. Rowe, 3 Myl. & K. 316.
The Attorney General v. Crupin, 1 Bro. C.C. 386.

July 9.—**THE MASTER OF THE ROLLS.**—The object of this suit is to obtain the direction of the Court for the distribution of the estate of Joseph Wildsmith, the testator in the cause. [His Lordship stated the will of the testator, and the state of the family, and proceeded]—As the testator directed the surplus income of his estate to be accumulated during the lifetime of the survivor of his children; and as Elizabeth, his surviving child, lived more than twenty-one years, namely, between twenty-nine and thirty years after his death, it is contended on the behalf of the plaintiffs, that the direction to accumulate beyond twenty-one years, is void under the statute 39 & 40 Geo. 3. c. 98, (the Thellusson Act,) and that the income accrued since the expiration of the twenty-one years, and the accumulations thereof, belong to the testator's next-of-kin. The heir-at-law concurs in the argument, that the direction to accumulate is void for the excess beyond twenty-one years, but claims such portions of the subsequent income and accumulations as have arisen from the produce of the testator's real estate. On the other hand, it was contended, first, that as the parents of eight out of the ten grandchildren took beneficial interests under the will, the direction to accumulate was lawful under the second section of the act—if not as to the whole fund, at least as to such part of it as was not given to the two grandchildren, whose parents being dead

took no beneficial interest under the will; and secondly, that if the direction to accumulate beyond twenty-one years, be void, the effect of the statute will be, not to give the subsequent interest to the next-of-kin or heir-at-law, but to accelerate the gift to the grandchildren, and to give them the whole interest. The statute, after directing that no testator shall dispose of his property, so that the income thereof shall be wholly or partially accumulated for more than twenty-one years after his death, and that in every case where such direction is given, the direction shall be void, provides, "that nothing in this act contained shall extend to any provision for payment of debts of any grantor, settlor, or deviser, or other person or persons, or to any provision for raising portions for any child or children of any grantor, settlor, or deviser, or any child or children of any person taking any interest under any such conveyance, settlement, or devise." As two of the grandchildren, for whose benefit the accumulation was directed, were not children of any person taking an interest under the will, and as the accumulation which is directed, does not appear to me to be a provision for raising portions, but a provision for making additions to the capital, for the purpose of making one gift of an aggregate fund, I think that the case is not within the proviso of the act, and that the direction to accumulate for more than twenty-one years is void.

The statute enacts, that where the direction to accumulate is made void, the rents and profits of the property directed to accumulate shall go to and be received by such person or persons as would have been entitled thereto if such accumulation had not been directed. It is argued, that the effect of this is, first to stop the accumulation, and then to give the rents, of which the accumulation is not allowed, immediately to the persons for whose benefit the accumulation was intended. But it appears to me, this would be in effect to make a new will or a new disposition for the testator. The testator having regard to the death of his youngest child, has directed his property, subject to certain payments, to be accumulated during the life of that child; and he has also provided, that during the life of that child, the vested

interest he had previously given, may be divested. He has given vested interests to all the grandchildren living at the time of his own death, but nothing is to be paid to them till the death of his surviving child, and in the meantime the interests may be divested and become vested in other persons; and, to direct that payment shall be made at the end of twenty-one years, before the death of the testator's surviving child, would be to direct that which the testator has not directed, and to defeat interests directly contrary to his meaning and intention.

The statute, as it appears to me, was not intended to operate, and does not operate, to alter any disposition made by the testator, except only his direction to accumulate. Striking that out, everything else is left as before; and all the other directions in the will, as to time of payment, the substitution of interests, or any contingencies, are to take effect according to the true construction of the will, unaltered by the effect of the statute. I think, therefore, the income which the will directs to accumulate, and which the statute forbids, must go as in the case of intestacy.

Then arises the question between the heir-at-law and the next-of-kin. The testator empowers the trustees to sell the real estate at any time they please after his death, but if not done before, he ordered them to sell after the death of his youngest child; but the sale was directed for the purposes of the will only, and for the benefit of the grandchildren or their children, not for the benefit of the next-of-kin. It appears there is a failure of the testator's intent; the income of the money arising from the sale of the real estates cannot be allowed to accumulate and be applied as the testator meant; the purposes of the will, as far as they can be lawfully carried into effect, do not exhaust the whole beneficial interest of the income arising from the real estate, and I think therefore that the heir-at-law is entitled to the unexhausted interest.

The other questions relate to the administration and distribution of the fund unaccumulated, and depend solely on the construction and effect of the will; and considering this, it appears that the testator intended, that subject to the weekly sums

and annuities given to his surviving children, the whole of his property should accumulate till the death of his surviving child, and should then be divided among all his grandchildren then living, but if any of them were dead without leaving issue, then among the survivors; and that if any of them were dead leaving issue, then the issue of such deceased grandchildren should have the share which their parents would have been entitled to if living. This appears to me to be the scope and intention of the testator's will. The testator meant an aggregate and previously undivided fund to be distributed and divided on the death of his surviving child. The interests were previously vested, but up to that time the vested interests were subject to be divested, and I think the plain intention of the testator cannot be carried into effect, without applying this to every part—to the interests which accrued in the grandchildren, and to the interests of the accrued shares which became vested in the grandchildren, to the interests of the original or accrued shares, which became vested in the children of the grandchildren; and tracing those through the different events that have happened, I think that the lawfully accumulated fund is distributable in sevenths, one-seventh to Mary Ann Smith, one-seventh to the children of Benjamin Wildsmith, one-seventh to the children of Joseph Wildsmith, one-seventh to John Peter Wildsmith, one-seventh to James Eyre, and the remaining two-sevenths to Francis Maceroni and George Maceroni. And with respect to these shares, the testator, after directing an annual distribution among his grandchildren, has made an exception in these words, "save and except the share of Francis Maceroni, one of the children of his late daughter Mary Ann Maceroni, deceased, (meaning the plaintiff Francis Maceroni,) one moiety or half part of whose share of his estate and effects he gave and bequeathed to his brother George Maceroni, (meaning the plaintiff George Maceroni,) in consideration of the benefit derived by the said Francis Maceroni from the will of the said testator's late brother Benjamin Wildsmith, deceased." I think, that the effect of this exception is to transfer from Francis to George one moiety of that which Francis would other-

wise have received in respect of his accrued share, and also in respect of the shares which would have accrued to him on the death of the three; and that in the result Francis Maceroni is entitled only to one-fourteenth of the fund, and that George Maceroni is entitled to three-fourteenths thereof. Under these circumstances, it is to be declared, that the direction to accumulate in the will is void, as to the time exceeding the term of twenty-one years after the testator's death; that so much of the fund as consists of the testator's personal estate or effects, or the accumulations thereof, belongs to the testator's next-of-kin, and that so much of the fund as constitutes the produce of the real estate, belongs to Mr. Wildsmith's heir-at-law; that the shares which accrued to the grandchildren, or children of the grandchildren, under the will, were subject to be divested on the death of such children of the grandchildren, in the lifetime of the testator's surviving child, in the same manner as the original shares given by the will to the grandchildren; and that the representatives of the grandchildren who died in the lifetime of the testator's surviving child, are not entitled to any share of the testator's estate; and lastly, that George Maceroni is entitled to three-fourteenths, and Francis Maceroni to one-fourteenth of the accumulated fund.

Mr. Agar, Mr. Tinney, Mr. Pemberton, Mr. Kindersley, and Mr. Wilcox, concurred in applying to have the costs of the suit taxed, and paid as between solicitor and client; relying on a former order, which directed the taxation and payment of the costs on that principle.

Mr. Treslove, Mr. Temple, and Mr. Anderdon, *contra*, opposed the application, contending, that such an order could only be made on the consent of all parties, and relying on the case of *Fenner v. Taylor* (4), where a bill being filed by one of two residuary legatees against the other, the usual decree was made; and it was held, on further directions, by Sir J. Leach, that costs could not be given out of the fund in court, as between solicitor and client, without the consent of the defendant.

(4) 5 Mad. 470.

The MASTER OF THE ROLLS.—I really think, the Court having on the former occasion ordered the costs to be taxed between solicitor and client, and this being a family cause, and necessarily prosecuted for the purpose of making a distribution of the fund, and having regard to that former order, I may order these costs to be paid out of the fund, as between solicitor and client. It is very reasonable.

The next question was, out of what fund the costs were to be paid.

Mr. Kindersley proposed that they should be paid *pro rata* out of the undisposed of part which had been declared to belong to the heir and next-of-kin.

Mr. Treslove, *contra*, said, that the costs should first come out of the undisposed of personalty, which belonged to the next-of-kin. That the heir-at-law was not liable to pay costs, and that the Court would not marshal assets as between representatives. That the testator had violated the law, in consequence of which, a portion of the estate descended to the heir-at-law, which should be free from costs.

[**The MASTER OF THE ROLLS.**—That part of the suit was actually necessary in order to establish the heir's right, and also the right of the next-of-kin.]

July 10.—The point of costs was again mentioned, when—

The MASTER OF THE ROLLS said—The testator has given the estate to the trustees, and he has given them a power which I conceive to be a discretionary power, to sell during the lifetime of his grandchildren; and he has expressly ordered, that if not sold in the lifetime of the younger child, it shall afterwards be sold; he has brought the real and personal estate into one fund, and he has directed it to be given to his children, and grandchildren, and the children of the grandchildren, in certain proportions; and he has directed the accumulations to be made, which the law does not allow: the consequence of which is, there is a portion of his property, a portion of the mixed fund, consisting partly of the produce of real, and partly the produce of personal estate, which is not disposed of. That portion of the mixed fund not being disposed of, a question has arisen to

whom it belongs. I have considered it to belong partly to the heir and partly to the next-of-kin. Then comes the question, how the costs of the suit are to be defrayed. I have no hesitation in saying, that I consider this will is so framed, that it was absolutely necessary to come to the Court to have the estate properly administered, because the testator himself had so expressed his intentions, that they could not be safely carried into effect by the trustees, without the direction of this Court; and as to part of them, it was necessary to apply to the Court for the purpose of having it declared that they could not be carried into effect at all. The expense of the suit, therefore, arises from the mode in which the testator has framed his own will, not from any fault of any party to whom he had made a gift by the will; not in consequence of any improper claim raised by any body, but in consequence of the difficulty which the testator himself had created; and the costs of the suit having arisen from such difficulties, I apprehend it to be the rule of the court, that they ought to be paid out of the testator's estate. The testator's estate consists, for this purpose, of two portions; one part of this he has legally and effectually disposed of to particular persons, and another part he has not legally and effectually disposed of to anybody, and which, therefore, is taken by the persons who are legally entitled, independently of any will of the testator. In this state of things, I apprehend it to be the regular and clear rule of the court, that the costs of the suit must be defrayed in such a manner, as not to disappoint the legal donees of the testator, but must be taken out of the fund which the testator has not disposed of, and which in fact, goes to the persons to whom the law gives it. I take it to be the clear rule of the court, that the expense of administering the estate must be paid out of the undisposed part of the testator's estate; but the undisposed part of the testator's estate consists partly of the produce of realty, and partly the produce of personalty. Are the costs to be thrown exclusively on one part? It might be so, if the testator had given directions different from those which he has given; but he has by his will constituted these portions of his estate into one common

fund, the fund which he has directed to be accumulated and divided in the mode in which he has directed by the will, and for the purposes of the will, they are one common fund; but, for other purposes, they are not to be considered as one common fund at all, but divisible into two parts, one of which belongs to the next-of-kin, and the other to the heir-at-law. Then, having constituted them one common fund for the purposes of the will, I can see no reason why they should not be considered as one common fund, for the purpose of paying the costs; and therefore I conceive that the costs are to be charged upon that part of the testator's estate which is not effectually given by his will, to be paid *pro rata* out of the two several parts; and accordingly, the total amount of costs being ascertained and paid, the residue of the fund may be then distributed *pro rata*; what remains as to one portion, will clearly belong to the heir, and what remains as to the other portion, belongs to the next-of-kin.

V.C. }
July 31. } FRANKLAND V. OVEREND.

Practice—Supplementary Answer.

Liberty given, after rules given to pass publication, to file a supplemental answer, in order to correct a statement as to the custom of a manor, and which was a matter in issue in the cause.

One question in this case was as to the custom of a particular manor. The bill was filed in November 1886, to which the defendant appeared, and he answered the bill in March 1887. The bill was amended in October 1887, and the amendments were answered in December 1887, and an order for a commission was obtained in April 1888, and rules had been given to pass publication. The defendant, by his answer, stated his belief, that the custom of the manor was as therein stated.

The defendant now moved for leave to file a supplemental answer, as to the custom of the manor. The affidavit, in support of the application, stated, that, at the time the said defendant putting in his answer, before referred to, the defendant

was ignorant of many of the customs of the said manor; and he now believes that the statement of the custom hereinbefore mentioned is incorrect, and is not the custom of the said manor, but that the custom is —[stating it].

Mr. L. Lowndes and Mr. Sidebottom, in support of the application.

Mr. W. R. Ellis, *contra*.

Strange v. Collins, 2 Ves. & B. 163.

Podmore v. Skipwith, 2 Sim. 565.

Greenwood v. Atkinson, 4 Sim. 54.

Tidswell v. Bowyer, 7 Sim. 64; s. c.

3 Law J. Rep. (N.S.) Chanc. 236.

were cited. And see *Nail v. Punter*, 4 Sim. 474.

The VICE CHANCELLOR said, there was a difference between the case of a party making an admission of a fact within his own knowledge, and of a fact, the knowledge of which was acquired from another person. The only means the defendant had of accurately knowing the custom, was through the steward of the manor. The steward gave such information as he had, but it turned out, after some months, that the defendant had a more accurate knowledge of the custom than he had when he filed his answer. He thought the application ought to be granted.

V.C. & L.C. }
June 8, 9, 22 & 23. } SAUNDERS v. SMITH.

Copyright—Piracy—Acquiescence—Injunction—Legal Rights—Jurisdiction of Court in cases of Alleged Piracy of Copyright.

The Court will not interfere to prevent trivial trespasses: and does not exercise its jurisdiction by injunction for the purpose of acting on legal rights, but interposes in order either to enforce legal rights, or to prevent mischief, until the time shall arrive when those legal rights may be ascertained.

A court of equity frequently refuses an injunction, where it acknowledges a right, when the conduct of the complaining party has led to the state of things which occasions the application.

If the owner of a copyright has, for some time past, acquiesced in different individuals

transcribing cases from his works, the Court will not interpose in his favour, by injunction against other parties who have subsequently transcribed the cases from the same work, until the owner of the copyright has established his legal right.

It is not only the quantity, but the quality of the matter extracted by a defendant from the work, of which the plaintiff has the copyright, that is to be considered in an application to the Court for its interposition by injunction.

The late case of Bramwell v. Halecomb (L.C.) explained.

In this case the plaintiffs were the proprietors of the copyright of divers Common Law Reports. The defendant Mr. Smith was the author, and the other defendant, Maxwell, was the publisher of a work entitled, *A Selection of Leading Cases on various Branches of the Law, with Notes*. The first volume of the work was published in the year 1837, and contained three cases, transcribed from the Common Law Reports, of which the plaintiffs had the copyright; and the first part of the second volume, which had been recently published, contained 219 pages of cases, transcribed from the modern Reports, of which the plaintiffs had the copyright (the number contained in the whole 305 pages of matter), and the residue of the number contained notes illustrating the law generally on the subjects to which the cases respectively related. One case (*Horn v. Baker*), transcribed from the 9th volume of *East's Reports*, occupied twenty-three pages. In page 204 of the number subjoined to the case of *Paterson v. Gandasequi*, transcribed from 15 *East*, p. 62, was the following note: "The two cases of *Anderson v. Gandasequi* and *Thomson v. Davenport* are so nearly connected with that of *Paterson v. Gandasequi*, that it has been thought better to lay them before the reader as a supplement to it, than to attempt any abstract of them in the note which follows;" and, in page 272, to the case of *Manly v. Scott*, taken from *Siderfin's Reports*, was added the following note: "In order to shew in what manner the doctrine established by the principal case of *Manly v. Scott* has been followed up in later times, the modern cases of *Montagu v. Benedict* and *Seaton v. Benedict*, which are,

perhaps, the cases most frequently referred to on this subject, are here inserted."

The plaintiffs (Messrs. Saunders & Benning, the law booksellers), by affidavit, stated, amongst other things, that "they did not take any means to prevent the sale of the first volume, because, out of forty-two cases contained therein, three cases only were copied from books of which they had the copyright, and that the defendant, J. W. Smith, previous to the publication of the first volume, proposed to plaintiffs to publish the work in question, which they declined, and that J. W. Smith stated, as a reason why he should prefer having the work published by the plaintiffs, that he would otherwise be unable to make use of the cases contained in Reports published subsequently to *Term Reports*, and the plaintiff, Wm. Benning, thereupon observed to Smith, that he, Smith, certainly could not take any cases, the copyright of which belonged to plaintiffs." The plaintiffs further deposed, that they were not aware of the contents of the first part of the second volume till the 19th of May 1838, and presumed that it was similar to the first volume, and did not interfere with any of the plaintiffs' copyrights, or only in a very small and trivial degree. The defendant Smith, by his affidavit, stated (amongst other things), that the composition of the notes was by far the most laborious part of the undertaking: that before the publication of the first volume, he sent for the plaintiff Benning, who waited on him, and defendant then proposed to him, that he and his partner should become the publishers of the work: that the defendant, on that occasion, told the plaintiff Benning, that he made him the first offer of the work, and that his reason for doing so was, that in order to complete his plan, it would be necessary to take cases from modern Reports, the copyright of most of which, as he believed, was vested in the plaintiffs: that the plaintiff Benning requested time to consider the defendant's offer, and consult his partner on it and on a subsequent occasion came again to defendant and declined it: that the defendant never offered the said work to the plaintiffs on any other occasion, and was sure he did not express an opinion that he should be unable to make use of the cases contained in the Re-

ports published subsequently to the *Term Reports*, in case of his not publishing the work with plaintiffs; and that each of the cases taken from the different reports was illustrative of a principle of law, on which a commentary or exposition was contained in notes appended to such case.

The defendant Maxwell deposed (amongst other things), that he believed the publication of the work in question would not only not be prejudicial to the sale of plaintiffs' Reports, but, on the contrary, was calculated to increase the ultimate sale thereof.

Mr. Knight Bruce, Mr. Jacob, and Mr. James Russell, for the plaintiffs, now moved to restrain the sale of any numbers of Part I, Vol. II. of the work in question.—The bulk of the work in question consists of transcripts of cases from the Reports of which the plaintiffs have the copyright, and the defendant Smith has no right to embody a whole report, or appropriate the marrow of a book, as has been done in this case. The plaintiffs did not take any means to prevent the publication, by the defendant Maxwell, of the first volume of the work, because a very few only of the cases contained therein were transcribed from the Reports of which the plaintiffs had the copyright; and it is clear from the affidavits, that Mr. Smith thought he could not publish his second volume of the work without the permission of the plaintiffs. The work in question is not a treatise on any branch of the law, nor an extract, but a republication of the reports themselves, of which the plaintiffs have the copyright, and, no doubt, is a useful book, on account of its being a selection of the best cases from the common law reports, many of the reports being now considered as overruled. For practical purposes—for the instruction and use of students and attorneys, and as a circuit companion, instead of the Reports themselves, the work will be found very valuable; but to the plaintiffs very prejudicial. The case of *Horn v. Baker*, which is transcribed from the plaintiffs' reports, occupies twenty-three pages of the defendants' work, and the notes affixed to it only occupy one page and a quarter, and no one could be allowed to print and publish that case separately, with a few notes only. Another point is, that a

party has no right to print and publish a reported case in such a manner as to render it unnecessary for the reader to refer to the original for the particulars of it. Suppose a party were to transcribe the most beautiful articles published in the *Encyclopædia Britannica*—as, for instance, Mr. Jeffreys' treatise on 'Beauty,' surely this would be piracy; and the case before the Court is the same in principle. Each case in the plaintiffs' Reports must be looked upon as a distinct and separate work—*Manman v. Tegg* (1).

Mr. Wigram, Mr. Willcock, and Mr. Warren, for the defendants.—The plaintiffs are not entitled to the assistance of the Court, it being clear from the evidence, that they have, for some time past, lain by and acquiesced in the publication of the work in question; for Mr. Smith, in the preface to the first volume, states that the work is to be completed in two volumes. The test, by which the question of piracy must be tried, is, whether the new work is calculated to be a substitution for the old one; and by no reasonable intendment can the defendants' publication ever supersede the use of the plaintiffs' Reports. The statute of Anne, relating to copyright, leaves the case quite open, and the question is, looking at the whole work, can it be said to be prohibited by law? From the *Term Reports*, twelve cases have been transcribed by defendant, which is about a case and a half per volume; seven cases are transcribed from the sixteen volumes of *East's Reports*, two from *Taunton's Reports*: from *Barnwall and Cresswell's Reports* of ten volumes, two cases only are taken; and, from *Bingham's Reports*, only one case. The small print of the notes exceeds in quantity of matter the letter-press of the text, and three of the cases, occupying thirty-nine pages, form no part of the plaintiffs' works. There are two hundred and forty cases to be found in the first volume of the *Term Reports*, so that, at this rate, there would be about two thousand cases in that work, from which the defendant has taken only twelve cases. No jury would, in a case like the present, award a farthing damages.

Romorth v. Wilks, 1 Campb. N.P. 94.

Dodsley v. Kinnersley, Ambl. 403.

(1) 2 Russ. 385.

Cary v. Kearsley, 4 Esp. 168.

Whittingham v. Wooler, 2 Swanst. 428, note.

The defendant has not transgressed the specified limits mentioned by Sir Thomas Plumer in the case cited from 2 *Swanst.*, and made his work a substitute for the plaintiffs' works. The cases of *Cutter v. Powell*, and *Marriott v. Hampton*, p. 237 in the work, occupy a few pages only, but the notes subjoined are very extensive. No one can justly say the defendant has been guilty of piracy, his only object having been to give his notes and illustrations of the law to the public at large in the most useful and valuable form. The other cases cited on the behalf of defendants, were *Gyles v. Wilcox* (2), and *Butterworth v. Robinson* (3).

Mr. Knight Bruce, in reply.—With reference to copyright, the quantum has no bearing in a case of this kind, where each case published is detached and separate from the rest, and perfect in itself. The quantum only is material, as evidence of identity; but here the identity is admitted. Neither has the *animus* anything to do with the abstraction of property. Suppose a copyright existed in Hume's *History of England*, whole chapters could not be selected from it and published. In the case of *Macklin v. Richardson* (4), an entire scene, taken in short-hand, from *Love à la Mode*, was restrained from publication; and the circumstance of the publication being accompanied with notes, is immaterial. Each case is a separate and distinct work, and this was settled by Lord Eldon in *Butterworth v. Robinson*.

THE VICE CHANCELLOR.—In this matter we must consider first of all, what is the case with regard to the rights of the parties, and what has been the conduct of the parties. Now, there is no question but that the copyright in the cases in question belongs to the plaintiffs: the question is, whether the species of publication which has been made by the defendants of these cases, is one of which the plaintiffs have a right to complain in this court, the object of the complaint being to obtain an injunction.

(2) 2 Atk. 141.

(3) 5 Ves. 709.

(4) Ambl. 694.

It seems to me, that there is a very wide difference between publishing a few cases selected out of a great number contained in fifty-two volumes, and publishing them with notes and observations for the distinct purpose of shewing how far the law has been varied or extended, or altered in any manner since the time the cases were first adjudged, and simply publishing the cases which are contained in the Reports themselves. I must say, it appears extremely difficult to believe that any injury or loss whatever has been sustained, or ever will be sustained by the plaintiffs from this publication; and I am bound to look at that circumstance, because the plaintiffs apply to me upon the ground in effect of irreparable injury, and they require this Court to interfere, because there has been, or may be, a serious violation of their property, by which they mean, serious with respect to the quantum of injury; but, it is perfectly certain, that the Court will not interfere in every case of injury to property. In mere common trespass, this Court will not interfere, although it does interfere where the trespass is of a nature which may tend to destroy the subject, or introduce some violent and excessive evil. It appears that there are, as I understand the matter, twenty-four cases published; and it is stated, that these are taken, here and there, out of fifty-two volumes, and that one of these volumes contains two hundred and forty cases; and, supposing there is the same number of cases in each of the fifty-two volumes, it is plain that the number of cases taken is about $\frac{1}{3\frac{1}{2}}$ th part of the whole, and $\frac{1}{3\frac{1}{2}}$ th part of this aggregate of cases is taken, not merely for the purpose of publishing the cases, and so eviscerating the valuable part of the plaintiffs' work; but the cases are published with a vast deal of original matter, entirely the composition, and the laborious composition, of the defendant; and I must say, that, knowing something as I do about the use of law books, I cannot induce myself to suppose that one set of Reports which is published by the plaintiffs, will ever be sold the less on account of the publication of this work; and I have looked so far through the work complained of, as to see that the very notes which are appended to the published cases themselves, refer, in

numerous instances, to cases scattered up and down the Reports, which are published and belong to the plaintiffs; and the true consequence therefore of it is this, that no person can hope to use, in a satisfactory manner, the book which has been published by the defendant, without making himself the owner, or, at least, having the power of access to those original books, which themselves are referred to by the notes. You cannot rely on the note as a correct statement of what is to be found in any particular case, without going back to the original case itself, and then reading it and comparing the statement with the note; and my notion is, that so far from this publication interfering with the plaintiffs' works, if it has any effect on the plaintiffs' works, it will be an inducement to people to purchase a work which, otherwise, they might not, perhaps, be inclined to purchase. That, however, may be merely fanciful; but the real fact is, that the works which the plaintiffs publish are so absolutely necessary to be in the hands of every person who is a lawyer, that my belief is, as I said before, that not one copy of them less will be purchased by reason of the publication of the work now complained of. It is quite obvious, then, that the new matter which is contained in this second volume, bears a very large proportion to the old matter which is made the subject of complaint. I do not myself, however, think, that that is an argument which would tend much to sustain the defendants' case, whereas, as it is said, it is perfectly clear, that parts of the plaintiffs' work have been taken; but I do think that the quantum in another sense is very material to be considered—that is to say, when it is considered what sort of proportion the part that has been taken from the plaintiffs' works bears to the whole of the plaintiffs' works. In that case, which was before me, and to which allusion has been made, there was this remarkable difference from the present case—viz. that there the passages transcribed and complained of were scattered up and down, were the most material parts of the plaintiffs' work; and it did appear to me, that a great deal of the value of the defendant's work depended on the fact, that it contained those passages that were taken from the plaintiffs' work. Now, my opinion is, that, in this case

before me, if the original cases had not been published, and a mere reference had been given to them, this work would have been nearly as valuable as it is; parties might have been told there was such a case, and there might have been a condensed account of what the case was, and then those notes might have been given, which are now found; but I understand that the Lord Chancellor seemed to consider that the quantum of the work was a matter upon which he was to exercise an opinion, and to determine, with regard to the quantum that was taken, whether there was such an injury done as that this Court ought to interfere. About the fact of there having been an abstraction by Mr. Halcomb from Mr. Bramwell's work, my mind was quite clear—there could not be a doubt, for I compared the individual passages; and it was utterly impossible to believe, that two people writing such a work as that, would themselves, originally, sentence after sentence, in upwards of one hundred instances, use identically the same words applicable to such a subject as the passing of bills through parliament. But, my Lord Chancellor thought there, that even if it were as the plaintiff said, yet that the smallness of the quantity taken was a reason why the injunction should not be sustained; and I think I understood the injunction was dissolved, although no action was tried, the action not having been tried because of the death of Mr. Bramwell. So far as that case goes, it is a case to shew that this Court will not interfere where the quantity that is taken is very minute; but when the quantity that is taken, is taken, as it appears to my mind, not for the purpose of giving to the world in a chapter or any other form, the contents of the plaintiffs' work, but for the purpose of making a portion of the plaintiffs' work an outlet, if I may so express it, for the accumulated knowledge which the defendant has collected on the subjects which are contained in this portion of the original work, the intention is not to injure the plaintiffs,—the effect cannot be to injure the plaintiffs,—but the real effect is to do that which the parties held out—namely, to disseminate in a useful manner to persons who are conversant with the law, the knowledge of the law itself.

Then, with respect to the conduct of the parties, it has been very properly observed, that there was no answer given to a certain passage in the plaintiffs' affidavit, which is as follows:—[His Honour here read the passage in question, relative to the alleged notice, &c. to Smith, that he could not take any cases from the Reports of which the plaintiffs had the copyright.]—Now, that passage, it is to be observed, is denied by Mr. Smith: it is denied in this way: that he deposes—[His Honour here read the passage]. It thus becomes a question, who is most accurate, and it is more likely that the matter was, as Mr. Smith represents it; because, I cannot conceive that, attending to the mode in which Mr. Smith knew he intended to manage his work, it would have occurred to him he was not at liberty to publish the cases in the way in which he did; but, the deponents (plaintiffs) proceed to state, "that Mr. Benning thereupon observed to Mr. Smith, that he, Smith, certainly could not take any cases, the copyright of which belonged to these deponents." Now, it is a very singular thing, that that observation should have been made, and no counter observation made in answer to it; but there the thing stops. This, at least, is an intimation given by the plaintiffs, that they had in their own minds a conception that the work could not be published with any of their cases, except by their consent, and that being the legitimate inference from the subsequent passages in the affidavit, just see what immediately precedes it: the plaintiffs say, "that, in the year 1837, the defendant published the first volume of the said work, and the reports of the cases contained in the first volume were taken and copied from various books of reports, the copyright of some of which belonged to the plaintiffs;" and they further say, "that they did not take any means to prevent the sale of the first volume, because, out of forty-two cases contained in the first volume, only the case of *Master v. Miller*, and part of the cases of *Mills v. Auriol* and *Lickbarrow v. Mason*, were copied from books, of which plaintiffs had the copyright." Therefore, in the first instance, before the works were published, the plaintiffs, as they represent, entertained the opinion, that none of the cases

which were in their own works, could be published by the defendants; nevertheless, the work is published with some of those cases; and having a distinct opinion in their own mind of what the law was, they never interfered to quarrel with these cases being published. But, if these cases are to be considered, as Mr. Knight Bruce says, every one of them as a separate and distinct work, it seems to me very singular, that these plaintiffs, knowing they had a distinct copyright in each of these three cases or reports, do not advert to the fact that the defendants were publishing their works. I do not quite accede to that view, because I cannot but suppose that the copyright in these several Term Reports and other things so purchased from time to time, and from volume to volume, and so on, was purchased in this manner, that volumes, and not individual cases, may be the subject of copyright—that is, the copyright is not formed in the way of assigning the copyright first of all in one case, and then in another. I do not think that material, because the substance of the case comes to this, that when there were three cases published, they did not choose to interfere; but just observe how that is: three cases are published in the first volume, which are taken promiscuously out of eight volumes; altogether, the number of volumes is fifty-two, and, in the second volume, there are twenty-four cases published out of forty-four volumes. Is there much substantial difference between the two instances of publication? There is some arithmetical difference with respect to the quantity; but, with respect to anything that actually takes place in the affairs of men, is there any substantial difference between taking twenty-four cases promiscuously out of the forty-four volumes, and taking three or four cases out of the eight volumes? The truth is, the thing is done in so rare and picked a manner, that it is impossible to believe any injury could arise to the plaintiffs; and the plaintiffs themselves have shewn, that they were sensible of no injury with respect to the three cases taken out of the eight volumes; and, it appears to me, they might just as well have continued that very feeling, and have imagined that the twenty-four cases taken out of the forty-four

volumes, have also not produced any injury to them. I do not understand it is actually sworn that any injury has been produced.

[*Mr. Willcock*.—It is not sworn that any injury has been produced.]

And rightly so in my mind, because nobody could believe any injury was produced, nor can any human being believe it ever will be. The consequence of this proceeding, I think therefore is, that the plaintiffs, by their conduct, have induced Mr. Smith to suppose, that if he did publish the three first cases without animadversion from the plaintiffs, he might also lawfully publish the other twenty-four cases in the way he actually has done; and this Court, in administering its relief, always has regard to what has been the conduct of the party who seeks the relief; and if there has been that thing which is technically known in this court by the term of *lying by*, and if the conduct of the plaintiffs has been such as reasonably to induce the defendant to imagine that he might persevere in that course in which he had first begun, this Court will say to the party, who complains after that course has been adopted, that he comes too late; and my opinion is, on the substance of the case, and on the conduct of the plaintiffs, that they are not entitled to the injunction they ask. I am perfectly aware, however, that a different view may be taken of my opinion, and of the facts of the case, and that it is quite right, if there really has been that *damnum ad injuriam* which the plaintiffs represent, that they should have liberty, notwithstanding that they are plaintiffs in this court, to bring such action as they may be advised. I shall, therefore, not grant an injunction, nor shall I say anything about the costs, but shall leave the plaintiffs to bring such action as they may be advised, and give the parties liberty to apply.

The plaintiffs having appealed from the order of the Vice Chancellor, the case came before the Lord Chancellor on the 20th of June 1838, when nearly the same line of argument was adopted on both sides that was used in the court below.

Mr. Jacobs and *Mr. J. Russell*, for the appellants.

Mr. Wigram, *Mr. Willcock*, and *Mr. Warren*, contra.

The LORD CHANCELLOR.—I have looked through the affidavits in this case, and the authorities which have been referred to, and I am very clearly of opinion, that the Vice Chancellor came to the right conclusion, and that his order ought to be supported; and I have come to that conclusion upon grounds which make it quite unnecessary for me to go into the question of law, which has been discussed. This Court does not exercise its jurisdiction for the purpose of acting upon legal right, but interposes for the purpose of better enforcing legal rights, or for the purpose of preventing mischief, until the time shall arrive in which those legal rights may be ascertained. In all questions of injunction in aid of legal rights, whether it be of copyright, whether it be of patent, or of various other descriptions of legal rights, which come indirectly before the consideration of this Court, the office of the Court is consequential upon the legal right, and it generally happens, that the only question the Court has to consider is, whether the case be so clear and so free from objection upon the grounds of equitable considerations, that the Court ought to interfere by way of injunction, without a previous trial at law, or whether the Court thinks it expedient, under the circumstances of each case, to abstain from exercising its jurisdiction until the legal title be established. That distinction depends on a great variety of circumstances; and it is utterly impossible to lay down any general rule, by which the discretion of the Court ought, in all cases, to be regulated. In this case, I find the publication complained of to be of a character, which, whether it be or be not an infringement of the copyright of the plaintiffs, is a course of proceeding which has been pretty largely permitted, and pretty generally adopted. In many instances stated during the argument, and in several referred to, where gentlemen at the bar have been desirous of publishing upon particular subjects, they have collected the cases upon those particular subjects, and have taken those cases, generally speaking, verbatim from the reports which are covered by legal rights. No instance has been offered to me, in which those entitled to the copyright have interfered: no judgment, therefore, has been pro-

nounced on that subject. I am not stating that they are not entitled to interfere—I am not stating whether the right is with the owner of the copyright to prevent such publications, or whether that use of a published report be or be not to be permitted. That is a matter which is purely a question of legal right, upon which I find no occasion at present to come to any adjudication; but it is very important, when I have to consider, whether I shall exercise the equitable jurisdiction before the legal right has been established, to find a course has been adopted pretty generally, and for many years, such as I have stated, and more particularly when my attention is drawn to this fact, that these plaintiffs have themselves acquiesced in a similar course of proceeding, and that in a book of which I have a copy before me—viz. *Mr. Chitty On Bills of Exchange*, there is a very large collection of reports,—whether they are all printed verbatim, is not very material,—but certainly many of them are from the published Reports of which the plaintiffs have the legal right.—[Here his Lordship said, the fact of the permission of the plaintiffs given to Mr. Chitty, was very material in the consideration, whether he ought to exercise a jurisdiction by injunction in favour of the plaintiffs, and observed, that there was, in the dealing with the case, that species of conduct which would deprive the plaintiffs of, at least, the interposition of the Court. His Lordship then adverted to the facts of the case of *Rundell v. Murray* (5), and read the concluding passage of Lord Eldon's judgment therein (p. 316), and after stating that he should assume the plaintiffs entitled to the copyright, proceeded to a lengthened consideration of the several affidavits, observing that the statement in the preface to the first volume, gave him a very safe guide, on which of the statements in the affidavits it was right to rely.]—His Lordship then continued as follows:—When I look at this work, I am not sufficiently acquainted with it to give an opinion upon the merits of it, but I have no doubt that the opinion expressed of it by others, who have had more opportunity of examining it, is entirely deserved: but I am looking at it now, not

for the purpose of ascertaining its merit as a law book, but for the purpose of seeing that it is a work of extreme labour; and I find, that the principle of it is to take the marginal note, sometimes altered, sometimes taken from the Reports, as laying down the principle of law, then working out that principle in this way—first of all, by stating a leading case, as it is called, that which is selected as enunciating the principle, and then, by very voluminous and obviously very laborious notes, working out the principle, and shewing how it is to be founded and established on a variety of cases, which are to be found in the books. It is clear therefore, from the nature of the work, that it was one of great labour; this was evident, from the publication of the first volume; and I find, therefore, those who are now asserting a title to this copyright, were informed before the month of March 1837, of Mr. Smith's intention so to deal with the existing reports. I find the first volume when published, announcing an intention of going on with the same plan, which necessarily would run over the period to which the copyrights of the plaintiffs relate; that no remonstrance is made to him after they saw the nature of his book, none is alleged, but the plaintiffs permit him to go on in the execution of this laborious work, until the period at which the first part of the second volume is published. In the meantime, a communication takes place with Mr. Maxwell, who is interested in the publication of this work; no objection is made to him, who has as much right to the consideration of the Court, in protecting his property, as Mr. Smith has. There are proposals in which Mr. Maxwell deals with this property, and wishing to make it a subject of arrangement with the plaintiffs. I do not find this led to any caution, or that any interposition, or any objection was made on the part of the plaintiffs to the course which Mr. Smith had pursued as to part, and which they must have been fully aware he intended to pursue further.

Assuming, then, for the purpose of exercising the equitable jurisdiction which I am called upon to exercise, that the plaintiffs had a legal right, I say, whatever legal rights they may have, the circumstances of the case are such as to make it the duty of the

court of equity to hold its hand, and to abstain from exercising the equitable jurisdiction, at all events, until (I will not say what course the Court would take if that legal title was established at law) the plaintiffs shall come here with the legal title established by a judgment at law; and in doing that, I am doing only that which Lord Eldon did in *Rundell v. Murray*, which appears to me not only as applicable to the case of copyright, but very generally exercised with reference to the question of patents, where, either with regard to the conduct of the parties, or any doubt as to the validity of the patent claimed, the Court always exercised its discretion, whether it shall interfere by injunction prior to the establishment of the legal right. I am quite clear the Vice Chancellor was correct in the view he took of this case; and it is not for a court of equity to interfere by injunction on this question; at all events in the present stage of the cause; therefore I must refuse this motion with costs.

Before I dismiss this subject, I am only desirous of saying a few words on the subject of the case, which I see relied upon very much in the Vice Chancellor's judgment, and of which (it is not published) it is quite obvious, the Vice Chancellor had not received any correct information. I mean the case of *Bramwell v. Halcomb*, which was lately before me. It is supposed, from the representations the Vice Chancellor made of that case, that I decided on the calculation of *quantity* on the one side or the other. In the first place, I never decided that case at all. That is the first observation I have to make; because it went off by an arrangement, and Mr. Halcomb, who was the party defendant and counsel in the case, seeing the view which I took of the case, proposed that the injunction should be dissolved, and in the event of the legal right being established, that the particular inquiry, which could only have been directed by the consent of the parties, should be directed for the purpose of indemnifying Mr. Bramwell against any loss he might have sustained;—upon this the injunction was dissolved. It then appeared that there had been an assignment of the copyright, which brought other parties into the

field. Of course, therefore, nothing could be done finally to dispose of the case; it stood over, and it was never brought forward again. I understand that it fell to the ground on account of the death of Mr. Bramwell in the meantime. I find this passage in the note that has been furnished to me of that case: "Then let the case stand until Saturday, as I take that view of the case." That arose from a suggestion of Mr. Stuart, which says, "Mr. Stuart—If the Master, in estimating the intermediate profits, gives us not only our share, but also compensation for the loss of the sale of our book, by reason of the sale of the defendant's book, that would be fair." Then I say, "If you agree that the injunction should be dissolved, and that the defendant should sell his book, and that if you establish your right, it should be referred to the Master to ascertain what damage you have sustained, that will be a fair arrangement." Then Mr. Stuart said, "Mr. Halcomb has sold his copyright to some other persons, who were also made defendants to the same record." Then I say, "Let the case stand until Saturday." Then on the Saturday, I should presume it is on the Saturday, I say, "As I take this view of the case," that is to say, the equitable arrangement which the parties proposed, "I abstain from saying anything as to the law." But in what I did say, which I suppose has been represented to the Vice Chancellor, so far from considering the question to turn on the mere measure of the quantity on the one side or the other, all that I find that I said about quantity is this, "When it comes to be a question of quantity," that is with reference to what Lord Eldon stated in some other case about quantity, "when it comes to be a question of quantity, it must be very vague. One writer might take all the vital part of another's book, though it might be but a small proportion of the book in quantity. It is not only quantity, but value, that is always looked to. It is useless to refer to any particular cases as to quantity." Now, there can hardly be anything less calculated to lay down a rule which would look at quantity only. That is all that appears to have been said on the subject of quantity. Then, in another

part of the case, I find, at the conclusion of the Solicitor General's reply, I said this, "I am already of opinion, that this is a case in which I ought not to exercise the jurisdiction of this Court without giving the parties an opportunity of trying the question at law, for where any doubt exists as to the rights of the parties, if the Court were to exercise jurisdiction without giving an opportunity of trial at law, there would be different law in this court, and in the courts of law, upon the subject." The proceeding here is merely for the purpose of making effectual the legal rights, as Lord Eldon says in *Wilkins v. Aikin* (6). Where any doubt exists as to the legal right, it is very proper to be tried. The only question is, whether, in the meantime, the injunction is to be continued, or whether it is to be dissolved, on the undertaking which the defendant has offered of keeping an account. It is obvious, that it is the interest of both parties that the injunction should be dissolved; for if, in consequence of piracy, the defendant is, in fact, selling the plaintiffs' work, the plaintiffs will have the profits of the publication; but if, on the contrary, no piracy has been committed, a very great hardship has been inflicted on the defendant, and on that supposition he has already experienced a severe hardship, because the injunction has prevented the sale of his book during the season. If Mr. Stuart thinks it proper to press the continuance of the injunction, I must look through the passages in the respective books. Then Mr. Stuart says, "We should not merely have the profits of the sale." It goes to that which came to an ultimate arrangement. There was no judgment at all on the question of law; there was nothing, therefore, to lay down any rule that quantity ought to be looked at, but it is quite the reverse; and the ground which I took, and the reason for the course I adopted, is exactly that for the course which I adopt now, namely, if the extreme hardship of the case be a matter of doubt, or if the parties have, by their conduct, encouraged or permitted the proceeding which is now complained of, the extreme hardship there, is upon

(6) 17 Ves. 422.

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the defendant, as compared with any hardship the plaintiffs may sustain, if the point of law afterwards turns out to be in his favour.

L. C. } *Ex parte* COLEGRAVE, AND *In*
May 24, 26. } *re* THE ACT 4 GEO. 4. c. 76.

Statute, Construction of—Consent to Marriage.

The Court has no power, under the act 4 Geo. 4. c. 76, to consent to the marriage of an infant, on the ground of the father refusing his consent from undue motives.

This was a petition by a female infant aged eighteen, stating that her father unreasonably, and from undue motives, refused his consent to a marriage which she was desirous of contracting, and praying that the Lord Chancellor might make a judicial declaration that the marriage was proper.

The application was founded upon the 17th section of the act above mentioned (1). The particular circumstances of this case were not gone into, it being arranged that counsel should first address themselves to the question, whether the act dispensed

(1) Whereby it was enacted, "That in case the father or fathers of the parties to be married, or of one of them, so under age as aforesaid, shall be *non compos mentis*, or the guardian or guardians, mother or mothers, or any of them whose consent is made necessary, as aforesaid, to the marriage of such party or parties, shall be *non compos mentis*, or in parts beyond the seas, or shall unreasonably or from undue motives refuse or withhold his, her, or their consent to a proper marriage, then it shall and may be lawful for any person desirous of marrying in any of the before-mentioned cases, to apply by petition to the Lord Chancellor, Lord Keeper or Lords Commissioners of the Great Seal of Great Britain for the time being, Master of the Rolls or Vice Chancellor of England, who is and are respectively hereby empowered to proceed upon such petition in a summary way, and in case the marriage proposed shall, upon examination, appear to be proper, the said Lord Chancellor, Lord Keeper, or Lords Commissioners of the Great Seal for the time being, Master of the Rolls or Vice Chancellor, shall judicially declare the same to be so; and such judicial declaration shall be deemed and taken to be as good and effectual, to all intents and purposes, as if the father, guardian or guardians, or mother of the person so petitioning, had consented to such marriage."

with the consent of the father in any case, except that of his being *non compos mentis*.

Mr. Wigram and *Mr. Stuart*, in support of the petition.—In an unreported case of *Ex parte Cooper*, V.C., 19th of August 1834, his Honour gave a judicial consent to an infant's marriage, on the ground of the father's being abroad. That is a direct authority in favour of this application, as it is impossible upon any construction of the act, to hold, that the event of unduly withholding consent, is not governed by the same words, as the event of a party whose consent was thereby made necessary, being in parts beyond seas.

[*The Solicitor General*, (who appeared for the lady's father)—I think the other side ought to call your Lordship's attention to the 26 Geo. 2 (2), which being made *in pari materid*, makes it quite clear, that the being *non compos mentis* was the only event provided for in the case of a father.]

That does not vary the construction to be put upon the new act.

[*The Lord Chancellor*.—The first sentence is complete in itself; and why should the sentence, applicable by the act to the guardian, &c., be referred to that former complete sentence as an antecedent?]

These questions and difficulties always arise upon an ill-worded statute. The alteration of the words of the old statute clearly shews an intention to supply, by this new statute, a judicial substitute for the consent of the father, in all those events in which such judicial consent was formerly held expedient in lieu of that of the mother or guardian. Looking at the general purview of this act, it would be an absurd construction to say, that it did not intend to apply a remedy to cases in which there might be an improper refusal on the part of the father. That is precisely the

(2) The 12th section of the act, 26 Geo. 2. c. 33, commences in the words following:—"And whereas it may happen that the guardian or guardians, mother or mothers of the parties to be married, or one of them, so under age, as aforesaid, may be *non compos mentis*, or may be in parts beyond the seas, or may be induced unreasonably, and by undue motives, to abuse the trust reposed in him, her, or them, by refusing or withholding his, her, or their consent to a proper marriage: be it therefore enacted," &c.

same mischief as an undue withholding of consent on the part of the mother or guardian. There will be great inconvenience, if a different construction from that of the Vice Chancellor is now put upon this statute.

The LORD CHANCELLOR—[without hearing the other side].—I cannot at present entertain a doubt that the act does not apply to this case; but as I am told that the Vice Chancellor has put a different construction upon it, the best way will be for me to communicate with him.

May 26.—The LORD CHANCELLOR.—I have looked over the act with the Vice Chancellor, and we entertain no doubt whatever, that upon the true construction of the act, the case of a father being *non compos mentis* was alone alluded to. The case of which the brief was handed up to me (3), was not considered.

V.C. }
June 2, 5. } KEBELL v. PHILPOT.

Equitable Mortgage by Deposit—Extension thereof, in what cases—Pleading—Supplemental Bill.

In order to constitute an equitable mortgage by deposit, there must be proof, either of the actual deposit or of the loan being made.

Though an equitable deposit may be extended to subsequent advances, where an agreement for the extension is proved, yet it cannot be so extended, if the proof of both the original deposit and loan fails.

It is not an objection at the hearing to the frame of a suit, that an administrator who is a necessary and not a formal party, is brought before the Court by a supplemental bill, to which the other defendants are not parties.

The original bill in this case was filed by John Kebell against Richard Philpot and Henry Minter, and Sarah his wife, and prayed an account of what was due to the plaintiff, on an alleged equitable mortgage,

by way of deposit of title-deeds, relating to a house and premises, situate in Kent, and of the furniture and effects in the house, and also prayed a sale thereof by the order of the Court; or that a valid mortgage might be ordered to be executed to the plaintiff, and that the defendant Richard Philpot might be restrained from proceeding further in an action of ejectment, commenced by him to recover possession of the house and premises.

The bill stated, that in 1806, a house situate at Ramsgate, was sold by public auction, by the four residuary legatees of Jane Kebell (one of whom was the plaintiff,) to Martin Smith, through the medium of his agent (Forster), for 400*l.*; that Forster paid 100*l.*, and the plaintiff, at the request of Martin Smith, repaid Forster the 100*l.*; and in the month of August 1806, the plaintiff paid himself 100*l.*, and also the three other residuary legatees the sum of 300*l.*, the residue of the purchase-money; that it was thereupon agreed between the plaintiff and Martin Smith, that the house should be conveyed to Martin Smith, and the plaintiff have an equitable mortgage or lien for the amount of the purchase-money and interest, at 5*l.* per cent.; that the house was duly conveyed to Martin Smith in fee simple, by indentures of lease and release of the 26th and 27th of August 1806, in consideration of the sum of 400*l.* so paid as aforesaid; that on the execution of such indentures, they, and the title-deeds and writings relating to the house, were deposited by Martin Smith with the plaintiff, as a security for the 400*l.* and interest; and that the same had since been and then were in the possession of the plaintiff, and that it was, on the occasion of such deposit, agreed between the plaintiff and Martin Smith, that the plaintiff should have an equitable mortgage or lien upon the said messuage, to secure 400*l.* and interest; that Martin Smith entered into possession of the said messuage, and for several years paid the plaintiff 20*l.* per annum, as interest on the 400*l.*; that in 1818, the sum of 82*l.* was due to the plaintiff for interest on the 400*l.*; and that in the year 1818, the house was much enlarged, and nearly rebuilt, and 700*l.* or thereabouts expended thereon; that the whole of that sum was advanced by the plaintiff for Martin Smith, and that

(3) This alludes to the case of *Ex parte Cooper*, before mentioned.

the plaintiff furnished the house; that the sum so advanced for enlarging and furnishing the house, together with the sums of 400*l.* and 82*l.*, amounted to 1,307*l.*, and that an account in writing, making up the said sum of 1,307*l.* was rendered by the plaintiff to Martin Smith, and was approved of and allowed to be correct by him; and that it was in 1818 agreed between the plaintiff and Martin Smith, that the plaintiff should have an equitable mortgage or lien upon the said title-deeds, then in the plaintiff's possession, and upon the said messuage and furniture and effects, to secure the sum of 1,307*l.*; and that Martin Smith, from 1818 down to 1822, paid the plaintiff interest on the sum of 1,307*l.*

Martin Smith, it appeared, died in 1822, having by his will, dated September 1806, made his wife Mary Smith, his sole devisee, legatee, and executrix, who never proved the will, although she entered into and continued in possession of the house until her death, and she left the defendant R. Philpot, her heir-at-law, who thereupon became entitled to the house in question, subject to the plaintiff's equitable mortgage, for 1,307*l.* and interest, if any such such existed.

Sarah, the wife of the defendant Henry Minter, procured letters of administration to Mary Smith; and the defendant Philpot, in 1834, brought an action of ejectment to recover possession of the house.

The defendants, by their answers, having submitted, that a personal representative of Martin Smith was a necessary party to the suit, the plaintiff, in March 1836, filed a supplemental bill against J. S. Daniel, as the only defendant thereto, and thereby stated by way of supplement, that on the 25th day of February 1836, letters of administration of the goods and effects of Martin Smith, limited for the purposes of this suit, had been granted to the said J. S. Daniel.

The common injunction had been obtained by the plaintiff to restrain the proceedings in ejectment, and was not attempted to be set aside up to the hearing of the cause. The depositions on the part of the plaintiff, proved the production of the several deeds and writings relating to the title to the house, and the will of Martin Smith, by his solicitor, Daniel, who stated,

that he received them from the wife of the plaintiff, at the residence of the plaintiff, about two years ago, and that they had ever since been in his possession. A book was proved containing items for repairs and furniture supplied during the year 1818, which corresponded with the different tradesmen's names employed. The items entered in the book were proved to be in the handwriting of Martin Smith; and the witness who proved the book stated, that he repaired the house in 1818, and was paid by Kebell, from whom he received his orders, and to whom he looked for payment.

Another witness deposed in the same terms as to his bill for repairs, and stated that, by the direction of the plaintiff, he called on Mary Smith, and pressed her to give a legal mortgage for the debt, which she declined to do, fearing, as she expressed herself, that she should be turned out of possession; but at the same time admitting that the property belonged to the plaintiff.

The auctioneer at the sale deposed, that the messuage was knocked down to Martin Smith; and he and another witness deposed, that Martin Smith and his wife were all their lives in indigent circumstances, and never worth 100*l.* at any one time; and that there was always great difficulty in procuring payment of the smallest sums of money from them.

It was proved, that Daniel (deceased,) acted as the solicitor, in preparing the purchase deeds, and that he was, during his life, the solicitor of the plaintiff.

The exhibits produced, consisted principally of receipts by the different tradesmen employed in repairing and furnishing the house in 1818, acknowledging payment of their bills by the plaintiff; the amounts whereof corresponded with the items set opposite to their respective names in exhibit 5, in the handwriting of Martin Smith; that exhibit was headed "Mr. Kebell's account," and it contained the names of the several tradesmen employed by the plaintiff, and opposite to their respective names were entered the sums which they had been paid, and which amounted in the whole to 482*l.* At the end of the several sums were subscribed the figures 482*l.*, and beneath those figures was added the word "settled."

The defendants did not enter into any evidence.

June 2.—On this cause coming on for hearing,—

Mr. Jacob, for the defendants, took a preliminary objection, that there was a defect in the frame of the suit, as regarded a personal representative of Martin Smith, and that the administrator of Martin Smith ought to be a party to the same suit to which his clients were parties; but His Honour overruled it, adding, that it was quite usual to direct a cause to stand over, with liberty to make an administrator the sole defendant to a supplemental bill.

Mr. Barber and *Mr. G. Richards*, for the plaintiff, submitted, that the evidence completely established that the different deeds and papers had come into the possession of the plaintiff, who was a stranger to Martin Smith, and that it was quite clear, that those deeds, &c. must have been delivered for some purpose; and taking into consideration the circumstance of the purchase-money for the estate being 400*l.*, and adding that sum, together with a sum for interest, to the amount of the bills for repairs and furniture, and the acknowledgment and adoption of that account by Martin Smith, by the word "settled," it was impossible for an instant to doubt for what purpose these deeds came into the possession of the plaintiff. They cited—

Ex parte Kensington, 2 Ves. & Bea. 79.

Ex parte Langston, 17 Ves. 227.

Ex parte Mountfort, 14 Ves. 606.

Bozon v. Williams, 3 You. & Jer. 150.

June 5.—*Mr. Jacob* and *Mr. Teed*, for the defendants, contended, that as the only evidence of the time when the deeds actually came into the hands of the plaintiff, was the evidence of the plaintiff's solicitor, which stated, that he received them from the plaintiff's wife about two years ago; the will of Martin Smith must be considered as coming into the plaintiff's possession at the same time with the other documents; and that it was rather singular, that if, as the bill alleged, those deeds, &c. were delivered to him by Martin Smith, Martin Smith should, as a mode of making an equitable mortgage by deposit, give his own will; that Daniel was solicitor to both parties, and prepared the deed of 1806,

and was paid for it, and the plaintiff had not produced any book of accounts or bill of costs of Daniel's, which would probably shew to whom that deed was delivered when executed, whether to Smith or the plaintiff; that the circumstance of no mortgage deed, and no memorandum promising to execute a mortgage, when called on, being produced, and the unvaried possession of this house being with Martin Smith and his wife, the legal presumption must be, that Martin Smith himself paid the purchase-money for that estate, of which he was to all intents and purposes the owner; that the rest of the plaintiff's case was an attempt to shew, that the plaintiff expended from time to time sums for repairs, and supplied furniture for the house, and that the sums, if any, advanced, constituted at the most a mere simple contract debt; and that even if a prior equitable mortgage were to be presumed, there was no authority for tacking to that a simple contract debt, without any evidence of the consent of the mortgagor that it should be so treated; that, in the cases cited, Lord Eldon decided, that after there had been an equitable deposit to secure an ascertained sum, it might be proved that there was a subsequent agreement to extend that deposit to cover a subsequent advance; that Lord Eldon would not shut out a party from proving a distinct agreement to secure further advances, but would not allow it, without evidence; and that, therefore, even if there were in this case an original deposit for the 400*l.*, and the sum of 82*l.* alleged to be due for interest, (for the purpose of tallying with the sum of 482*l.* in the settled account,) there was not a particle of evidence to shew a subsequent agreement to secure that debt.

The VICE CHANCELLOR.—I am asked in this case to proceed as on the foundation of matters of fact. The bill alleges, that the title-deeds were originally deposited as a security for the sum of 400*l.* and interest; but not a particle of evidence of any such deposit is adduced, nor is there any evidence of the payment of 400*l.*, as stated by the bill; then I am asked to infer from a document in evidence, that the sum of 482*l.* therein mentioned, consisted of the principal sum of 400*l.* and

an arrear of interest; but unless some proof of the deposit of the deeds or of payment of the principal sum of 400*l.* is forthcoming, I cannot say there was any such original deposit of deeds, or payment of the sum of 400*l.*, in the year 1806. The bill states, that in the year 1818 it was agreed, there should be a mortgage, not only for the sum of 400*l.*, alleged to have been previously advanced, but for the amount of the repairs done to the house, and furniture supplied by the plaintiff. I have some sort of evidence of payments made by the plaintiff for repairs, &c. done to the house; but I see no proof of anything like an agreement for the extension of the alleged mortgage by deposit, to the amount paid by plaintiff for the repairs, and the furniture supplied to the house. The plaintiff's case presupposes a previous deposit of deeds, but the payment of the amount due for repairs to the house, and for the furniture supplied is not a circumstance whereby to infer the previous payment of the principal sum of 400*l.*; and the plaintiff of necessity couples the transaction of 1818 with that of 1806. It is further alleged by the bill, that the will of Martin Smith was delivered on his death to the plaintiff by Mary Smith, his executrix; but I find no proof adduced in support of this allegation, nor of the time of the will coming into the plaintiff's possession; and if there be no proof, either of the time when the title-deeds came into plaintiff's possession, or when the will came into his hands, why should I not presume, that the title-deeds came into the plaintiff's possession at the same time as the will—that is to say, after the death of Mary Smith? It is quite consistent with the proofs in the case, that there might never have been any deposit of the title-deeds at all. The evidence in the cause relative to Mary Smith's observation, that the house and premises belonged to the plaintiff, shews there was some misunderstanding, at least, between the parties. If she used the expression imputed to her, it was clearly a mistake, the property, by the plaintiff's shewing, being clearly not his; and it does not follow, even if Mrs. Smith did use that expression, that we must infer from it, that the plaintiff was entitled to an equitable mortgage. Another circumstance in the

case is this, that no search is proved to have been made amongst the books and papers of E. Daniel, (now dead,) the plaintiff's solicitor in the transaction. Surely there must have been some facts stated or referred to in them, relating to the transactions between the parties. I cannot say I am authorized to send the case to the Master for an inquiry, because I have no proof when the deposit was made, or when the alleged principal sum of 400*l.* was advanced; but I do not object to give the plaintiff the benefit of one or more issues if he chooses to take them; which may be as follows—viz. whether the indentures of August 1806, &c. were deposited with the plaintiff as a security for the sum of 400*l.* and interest; and if so, whether in 1818, an agreement was entered into between the plaintiff and Smith, for an extended equitable lien in favour of the plaintiff, on the same deeds, &c., for the further sums mentioned in the pleadings, with liberty to indorse special circumstances.

The plaintiff having accepted the issues, the will of Martin Smith was ordered by his Honour to be delivered up by the plaintiff, to be proved by the defendant, Sarah Minter, she undertaking to prove the same, and not to require the plaintiff to file a supplemental bill. An account was also directed of the rents and profits of the estate, from the time of filing the bill.

L.C. } THE MARQUIS OF EXETER v.
January; } THE MARCHIONESS OF
June 21. } EXETER AND OTHERS.

Jurisdiction—Mistake—Settlement rectified.

Previous to the marriage of the plaintiff with the defendant, certain proposals in writing were made for settling part of the estate of the former, and in a list of the estates to be settled, certain property in Lincolnshire was comprised. The plaintiff had other property in Lincolnshire; the settlement, as executed, comprised the former estate, and by the general words, "all other the hereditaments of the plaintiff in Lincolnshire," included also the latter:—Held, that this was a proper case for the interference of the Court to reform the settlement.

Previous to the marriage of the plaintiff, certain proposals in writing were made by his solicitors on his behalf, to the solicitors of his intended wife, for a settlement of part of his estate; whereby it was proposed, that the plaintiff should convey a certain part of his estate, to be thereafter agreed, to trustees, for securing pin-money and a jointure for his intended wife, and portions for younger children, with an estate for life to the plaintiff, with remainder to his first and other sons in tail, &c.—A list or schedule was agreed on, of the estates to be settled, which, as far as related to his Lincolnshire estates, was as follows:

“Lincolnshire Bourne, 1,524*l.* 12*s.*

Bourne fenn lands, 279*l.* 4*s.*

Morton, 275*l.* 13*s.*”

It appeared, that besides the estates therein specified, the plaintiff possessed in Lincolnshire a very valuable manor and estate, situate in Stamford, called the Stamford estate, producing a rent of about 5,000*l.* a year. A settlement was accordingly made and executed, which, after accurately describing the property agreed to be settled, contained the following words: “and all other the messuages, farms, lands, tenements, and hereditaments, of or belonging to the said Brownlow Marquis of Exeter, lying and being within the said manor or lordship of Bourne Morton, in the said county of Lincoln, and all other the manors, messuages, lands, tenements, hereditaments, and premises of him, the said Brownlow Marquis of Exeter, within the said counties of Northampton, Bedford, Buckingham, and Lincoln.”

It appearing, that under the general words, the Stamford estate passed, and became, at law, subject to the trusts of the settlement, contrary to the intention of the parties, this bill was filed by the Marquis against the Marchioness of Exeter, the children of the marriage, and the trustees of the settlement, praying that it might be decreed, that the Stamford estate was not intended to be comprised in the marriage settlement; and that the estate might be released from the trusts of the settlement; and that the general words complained of might be decreed to have been inserted therein by mistake; and that the said mistake might be rectified, and that all proper parties might join in a reconveyance.

The facts were proved by the production of the proposals, the schedule, and the settlement, and by the evidence of the gentleman employed at the time of the marriage, as the defendant's solicitor.

Sir Charles Wetherell and *Mr. Jemmett*, for the plaintiff, contended, that it had been clearly proved, that a mistake had been made in the introduction of the general words, which passed the Stamford estate, contrary to the intention of the parties; that the jurisdiction of the Court to rectify a settlement where errors had been made, was now well established. They cited 1 *Sug. Vend.* p. 163, *Thomas v. Davis* (1), *Simpson v. Simpson* (2), and *The Duke of Bedford v. Marquis of Abercorn* (3).

Mr. Walford, for the Marchioness of Exeter.

Mr. Barber, for the trustees.

Mr. Sidebottom, for the releasees to uses and the children of the marriage, submitted, first, whether the Court had jurisdiction to interfere in this case;—secondly, whether parol evidence was admissible to prove the mistake, the Statute of Frauds requiring that all marriage agreements should be in writing; and, thirdly, whether the evidence in this case was sufficient.

Sir Charles Wetherell, in reply.

The LORD CHANCELLOR.—There can be no question as to the jurisdiction of the Court; but in suits of this description, the Court looks with great anxiety to see that the case is clearly proved; I therefore think it right to look into the evidence before I give judgment.

June 22.—The LORD CHANCELLOR said, he had looked into the pleadings and evidence, and was of opinion, that the evidence brought the case within the principle of those cases, in which the Court exercised a jurisdiction, in correcting errors in settlements;—that it was clear that the Stamford estates, which were in Lincolnshire, were no part of the property contemplated in the list, which had been agreed upon previous to the marriage—[His Lordship read it]; that it was clear, that they were not

(1) 1 Dick. 301.

(2) Vice Chancellor, July, 1837.

(3) 1 Myl. & Cr. 312; a. c. 5 Law J. Rep. (N.S.) Chanc. 230.

intended to be included in the settlement, and formed no part of the proposal for a settlement.

[His Lordship made a declaration in accordance with his judgment; but the first tenant in tail being an infant, he refused to direct a reconveyance, which, he said, must form the subject of a future application.]

M.R. }
June 22. } WILLSON v. LEONARD.

Production of Papers—Practice.

The defendants, by their answer, admitted, that they had in their possession the documents, &c. set forth in the second schedule. The schedule contained the following passage:—

“Brief and various papers in the action at law, brought by the complainant against the executors.

“Numerous letters from the executors, Dr. Chadwick and others, addressed to the executors’ solicitor, being confidential communications which have passed between these defendants’ solicitor and the parties last mentioned, with reference to the subject-matters of this suit.

“Various cases and opinions of counsel taken by or on the behalf of the executors, and relating to the subject-matters of this suit.”

Mr. Girdlestone moved for the production of the several documents, including the letters.

Mr. W. C. L. Keene resisted the production of the letters, which, he submitted, were confidential communications, which would never have come to the knowledge of the solicitor, but for his confidential character. He cited—

Greenough v. Gaskell, 1 Myl. & K. 98.

Storey v. Lennox, 1 Myl. & Cr. 525;

s. c. 6 Law J. Rep. (n.s.) Chanc. 99.

Curling v. Perring, 2 Myl. & K. 380;

s. c. 4 Law J. Rep. (n.s.) Chanc. 80.

Mr. Girdlestone, in reply, said—That *Curling v. Perring* differed from the present case; because, in that case, the communications took place after the commencement of the litigation.

The MASTER OF THE ROLLS refused to order the production of the documents, saying, that if he made the order, it would be discharged elsewhere.

V.C. }
Aug. 1. } LEWIS v. JOHN.

Mortgage—Practice—Costs.

In a suit to compel payment of the amount of an equitable mortgage, the mortgagor being dead, the order for taxation of the plaintiff’s costs at law, applies only to the costs of the ejectment, and not to the costs of proceedings upon a bond given by the deceased mortgagor, to secure the amount of the mortgage-money.

This was a suit to enforce the payment of the amount due on an equitable mortgage of copyhold estate, the mortgagor being dead. The mortgagee had also brought an action at law against the executrix, on a bond for securing the same debt. An order had been made for the taxation of the plaintiff’s costs incurred in this suit and at law: and the question was, whether the mortgagee was entitled to the costs of this action on the bond.

Mr. Knight Bruce and Mr. Spence, for the plaintiff.

Mr. Cooper and Mr. Wilbraham, contra.

The VICE CHANCELLOR decided, that the plaintiff was entitled to the same costs as if it had been a legal mortgage; but said, he apprehended, that under the order to tax the plaintiff’s costs of this suit and at law, the Master would only include the costs of an action at law for the recovery of the estate—namely, of an action of ejectment, and not the costs of the action on the bond for securing the same debt.

H. Lds. }
Aug. 16. } JONES v. SCOTT.

In this important case, which is reported in 8 Law J. Rep. Chanc. 83, s. c. 1 Russ. & Myl. 255, and 9 Law J. Rep. Chanc. 252, the decision of Lord Brougham was this day reversed by the House of Lords.

V.C. }
May 28. } BRANWIN v. CLARK.

Practice.—Process—Service of Subpoena to Appear—4 & 5 Will. 4. c. 82.

Service of subpoena to appear, on the agent of a defendant, to a foreclosure suit, who had been appointed by the defendant to receive his rents in his absence from this country, ordered to be good service; the defendant having quitted England for America in 1833, and having stated his intention not to return for some years to come.

Mr. Knight Bruce moved under the act of parliament, 4 & 5 Will. 4. c. 82. s. 1, that service of the subpoena to appear and answer the bill on the agent of the defendant, in this country, might be deemed good service. It appeared on affidavit, that the bill was filed by the plaintiff, as mortgagee, for the purpose of foreclosing the real estate of the defendant, the mortgagor, who, with his family, had quitted this country in 1833, long before the filing of the bill, for the United States of America, and had since taken up his residence there. The defendant and his family had not been heard of for nearly two years, but in his last letter to a friend of his in this country, he expressed his intention of not returning to England, until his youngest daughter, who was then eighteen years of age, attained her majority. Perkins, the defendant's agent, stated that he was appointed by the defendant the receiver of his estates in 1832, and that he had acted as such ever since. The material part of the 1st section of the act is as follows:—"That it shall and may be lawful for the Courts (of Chancery and Exchequer) respectively, on motion in open court, of any of the complainants in any such suit, (concerning any charge, lien, judgment, or incumbrance on any lands, &c.,) founded upon an affidavit or affidavits, and such other documents as may be applicable for the purpose of ascertaining the residence of the party, and the particulars material to identify such party and his residence, and also specifying the means whereby such service may be authenticated,—to order that service of a subpoena to appear and answer, upon the party in the manner thereby directed, or in case where the said

Courts respectively shall deem fit, upon the receiver, steward, or other person receiving or remitting the rents of the lands or premises, if any, in the suit mentioned, returnable at such time as the said Courts respectively shall direct, shall be deemed good service of such party; and afterwards, upon an affidavit of such service had, to order an appearance to be entered for such party, in such manner, and at such time, as the said Courts respectively shall direct; and that thereupon it shall and may be lawful for such Courts respectively, to proceed upon such service so made as aforesaid, as fully and effectually as if the same had been duly made within the jurisdictions of such Courts respectively."

His Honour said, he considered it a fit case in which to make the order under the act, and directed the subpoena to be made returnable on the first day of next Michaelmas term.

V.C. }
May 28. } FIGGOTT v. GARAWAY.

Practice.—Stock—28th Order of December 1833—Construction.

An order had been made in the cause, by the Court, that such a sum of stock as would raise 10s. in the pound on certain legacies, should be sold out and paid to the respective legatees thereof, the amount to be verified by affidavit. It was objected in the Accountant General's office, that the amount to be paid must, under the 28th order of court, of December 1833, be specified and expressed in the order; but the Court determined that that order did not apply to cases of this description.

Mr. Knight Bruce applied to the Court under the following circumstances:—An order had been made in the cause, that such a sum of stock as would raise 10s. in the pound, calculated on certain legacies, should be sold out and paid to the legatees respectively, the amount to be verified by affidavit. By the 28th of the new orders of court, of December 1833, it is directed "that in all cases where any sums of money, or any securities, or other

effects, belonging to the suitors of the Court of Chancery, shall be directed to be paid into or deposited in the Bank of England, in the name and with the privity of the Accountant General of the said Court, and in all cases where any such sum of money, or any securities, or other effects, be directed to be paid out, or invested in the purchase of securities, transferred, or carried over or delivered out, the exact sum of money and amount of securities so to be paid out, invested, transferred, or carried over, be ascertained by the registrar, and specified and expressed in the order of court, in words written at length, except in the case of residues of money or securities remaining after a portion directed to be applied for particular purposes," &c.

The clerk in the Accountant General's office objected to the form of the order, inasmuch as the sum directed to be paid was not mentioned in it, which he alleged ought to be expressed in the order under the above order of court.

It was now contended, that the frame of the order in question was the proper one; and that if the objection raised were allowed to prevail, an order for part of the amount of costs, which was directed to be verified by affidavit, could never be made without the necessity of incurring the expense of sending to the Master's office, the effect of which would be extremely inconvenient. That, in short, the simplest cases must be sent to the Master's office, if the rule were allowed to be such as suggested in the Accountant General's office.

The VICE CHANCELLOR was of opinion, that the 28th order of December 1833, did not apply to cases similar to the one before the Court; for if an order directed an unascertained sum of money to be paid out, the amount could not be stated in the order, inasmuch as the affidavit verifying the amount must be made at a subsequent period. His Honour added, that the order in question was only applicable to cases, where the sum to be paid out was ascertained, and could be specified and stated at the time the order was made.

V.C. }
May 31. } BOYS v. MORGAN.

Practice. — Demurrer — 10th Order of Court, of December 1833.

The intervention of holidays when the offices of the court are closed, makes no difference in the time within which a demurrer must be filed by the 10th new order of December 1833.

Mr. Knight Bruce moved to take a demurrer off the file for irregularity.—The defendant entered his appearance to the bill on the 11th of May instant, and filed his demurrer to the bill on the 24th of the same month, being the thirteenth day from the day of appearance, whereas twelve days only are allowed from the time of the appearance to the bill, for the filing of a demurrer, by the 10th of the orders of court of December 1833.

Mr. James Russell, contra.—If the demurrer be filed before 11 o'clock of the day immediately following the last of the twelve days allowed by the 10th order, it is in practice considered as filed on the preceding day, especially where, as in this case, the offices were closed during the intervening week. In *Bullock v. Edington* (1), the question was, whether the demurrer was filed in time, and it was held, that the eight clear days in that case, meant eight clear office days, and the days during which the offices are closed ought not to be reckoned, with reference either to the filing or the entering of demurrers. But the special circumstances of this case ought to relieve it from a strict construction of the 10th order, for the bill was filed by the plaintiff as the personal representative of the testator, and if the defendant is right in his construction of the will, there would be an end of the plaintiff's case.

The VICE CHANCELLOR.—The case cited, and decided by Sir Anthony Hart, does not affect the question before the Court. There, it was held, that the time must be reckoned according to the ordinary rule then acted upon. But, by the 10th order of December 1833, twelve days only are to be allowed to a defendant for filing a de-

(1) 1 Sim. 481.

murrer, calculating the same from the time of the appearance: the intervention of holidays making no difference, inasmuch as a demurrer may be filed in vacation, just as easily as a bill.

V.C. }
 May 29; } MARRIOTT v. TARPLEY.
 June 1, 4. }

Right of Church-way—Churchwarden—Churchwarden's right to sustain a Suit—Misjoinder.

A churchwarden has a right to continue a suit, properly instituted by him whilst in office, after his office is determined; and a churchwarden chosen at a subsequent period, is entitled whilst in office to join himself as co-plaintiff in a supplemental bill with the former churchwarden, for the purpose of putting in issue facts that have arisen since the filing of the original bill, he having an interest in the proceedings, and in the decree to be made at the hearing.

The question in this case was, whether there was a right of way from the vicarage-house of Floore, in the county of Northampton, over certain land, consisting of a garden and ornamental plantations, of one of the parishioners, to the church of the parish. The bill was filed in August 1833, by W. Marriott, as one of the churchwardens, against the defendant, Tarpley, who was the vicar of Floore, the dean and canons of Christ Church, Oxford, as the patrons of the living, and Thomas Marriott, the other churchwarden: and it stated, that the churchyard was the freehold of the parson or rector; that the churchwardens, out of the church rates, were liable to maintain and keep in repair the boundary fence of the churchyard; and that the defendant Tarpley had, whilst with his agents in the churchyard, pulled down that part of the wall of the churchyard next the garden and plantations, claiming a right of church-way directly from the churchyard across the garden, &c. to the vicarage-house. The bill denied the right of way, and stated, that if there ever had been any right of way in that direction, it had been used only on sufferance, and had been discontinued for

a period of more than forty-five years last past, and that the defendant Tarpley had not procured the consent of the patrons of the church, nor obtained any faculty to justify him in pulling down the churchyard wall, and prayed a perpetual injunction against Tarpley to restrain him from pulling down the same. An injunction was awarded in April 1834 to restrain Tarpley from pulling down the churchyard wall; and a supplemental bill was filed in 1835 by James Phillips and William Marriott, the former having been elected churchwarden in the place of the latter, against Tarpley, for the purpose of putting in issue the facts of a trial at law, in which Jakeman was plaintiff, and Tarpley defendant, and in which the defendant pleaded a general highway, and also a vicar's way over the grounds in question, to the plaintiff's declaration in trespass, and in which the defendant failed. Evidence, at great length, was adduced on both sides, with reference to the right of way.

Mr. Wakefield and Mr. Turner, for the plaintiff, cited 1 *Burn's Eccl. Law*, 346, 2 *Roll's Abr.* 287, *Vin. Abr.* 'Churchwardens,' A, 2, pl. 4, 5, and *Anon.* (1), in support of the right of churchwardens to maintain the suit; and contended, that the duties of the churchwardens were to protect the ornaments, pews, &c. of the church; that the case was similar to that of a trustee of a charity estate for the benefit of a parish, who had a right to the aid of the Court to prevent injury to the charity property; that this Court would interfere in a case like the present to prevent waste in aid of an action at law; and that the rule of law is, that where the guardianship of property is in the churchwardens, the law will enable them to exercise their ownership by proceeding against trespassers on the property relating to the church. *Watson's Clergyman's Law*, p. 382, and *Gibson's Codex Anglic.* p. 218, Canon 85, were also cited to shew, that although the freehold of the body of the church was in the clergyman, yet the churchwardens having the use of the seats, they, and not the parson, had the right of action against trespassers; and that it was the same as to the fences of the churchyard, the churchwardens being bound to keep the same in repair.

(1) 1 Vent. 127.

Mr. Knight Bruce, for the defendant Tarpsey.—This was a case *primæ impressionis*, and the plaintiff might proceed by bill on behalf of himself and his fellow parishioners, or the Attorney General might file an information—*The Attorney General v. Brown* (2); but a single parishioner cannot file a bill of this nature. The other side have not shewn that the plaintiff may maintain an action in a case of trespass like the present; and if he cannot maintain an action, he certainly cannot sustain a suit. The placitum in *Vin. Abr.* refers to *Brooke* and the *Year Books*, and at the conclusion thereof, after stating that the churchwardens might maintain an action for the goods of the church, are the following words—viz. “sed contra of things real,”—*Com. Dig.* ‘Esglise,’ (F.) 3. The nature of the relief sought by this bill is singular, and a bill about pulling down walls is quite novel in the annals of the law. It is not usual in this court to conclude a right on a single trial, and this point received much discussion in *Chambers’s case*, before the Lords Commissioners, who directed proceedings at law to be taken, because the previous proceedings had not been instituted under the orders of the Court of Bankruptcy. W. Marriott, the plaintiff in the original bill, has long ceased to be a churchwarden of the parish, and cannot therefore maintain the original suit. Phillips, in 1835, was appointed the new churchwarden, and he, in the supplemental bill, is joined as co-plaintiff with W. Marriott, the plaintiff in the original bill, who had ceased at that time to be a churchwarden of the parish. This is a misjoinder, and fatal to the supplemental suit, supposing that the original suit can be sustained. The right of churchway was not in issue in *Jakeman’s action*, and has never been tried.

Mr. Koe and *Mr. Waddington* in the same interest.—*Bacon’s Abr.* ‘Churchwardens,’ p. 601, corresponds with the passage cited from *Com. Dig.*, shewing that the churchwardens have a special property in the bells of the church, &c., but that it is otherwise of things real. *Year Books*, Michaelmas term, 13 Hen. 7. p. 9, and

11 Hen. 4. p. 12, Michaelmas term—*Brooke’s Abr.* tit. ‘Corporation,’ 186, prove that the churchwardens may have an action for the chattels of the church, but not for the realty. The case in *Godbolt*, 279, is controverted in 1 *Bac. Abr.* tit. ‘Corporation.’ If the churchwardens are unable to raise a rate, their liability to repair the church walls is at an end, that liability not being personal; and *Phillips v. Pearce* (3) shews that there was no interest in the churchwardens in a matter of this nature before the statute 59 Geo. 3. c. 12. There is a remedy in the Ecclesiastical Court in a case of this nature—*Bennett v. Bonaker* (4); and no doubt a churchwarden has a right to exhibit articles against a clergyman for injuring the churchyard—*Walter v. Montagu* (5).

Mr. Wakefield, in reply.—The churchwardens are bound to repair, although they have no funds in hand, and if they fail to do the requisite repairs to the church walls, &c., they become subject to the censure of the Ecclesiastical Court. This Court possesses two powers: the first enables it to prevent an injury being committed during the progress of proceedings in the Ecclesiastical Court; and by means of the second, it grants a permanent injunction to restrain the defendant from committing the injury contemplated. In *Dent v. Prudence* (6), it is laid down, that the churchwardens may, after they have gone out of office, carry on proceedings which have been commenced whilst they were in office. The plaintiff has not prejudiced himself by making Phillips a party to the supplemental bill, which was instituted for the purpose of continuing the former suit, and putting in issue the proceedings in the trial at law. *Cuff v. Platell* (7), *The King of Spain v. Machado* (8), and *Raffety v. King* (9), are authorities to shew that the objection, on account of misjoinder, must be taken by plea or demurrer, and not at the hearing of the cause.

(3) 5 B. & C. 433.

(4) 2 Hagg. 25.

(5) 1 Curt. Rep. 253.

(6) 2 Stra. 859.

(7) 4 Russ. 242; a. c. 1 Law J. Rep. Chanc. 2.

(8) 4 Russ. 225.

(9) 1 Keen, 601; s. c. 6 Law J. Rep. (N.S.) Chanc. 87.

(2) 1 Swanst. 265.

The VICE CHANCELLOR [after stating the facts of the case, said]—It is beyond all question that the Court can entertain this suit. A case in 1 *Vent.* 127 (Charles 2.) was cited at the bar, in which a prohibition was prayed on behalf of a churchwarden, for that articles were tendered to him on oath, whether any person within his parish had encroached upon the churchyard; and it was said, that it concerned matter of freehold, but that was overruled, inasmuch as they may take notice of encroachments upon the churchyards, and the Court denied the prohibition. Another case on the subject was *Quiller v. Newton* (10), in which it was resolved by the Court, "that a prohibition should not be granted to any suit in the spiritual court for any nuisance or other matter done in a churchyard, upon a suggestion, that a churchyard is a lay-fee, for a nuisance there is of ecclesiastical cognizance." It was alleged, that this Court would not entertain this suit, because the churchwardens could not bring an action; but if the churchwardens, in a case like the present, can maintain a suit in the Ecclesiastical Court, this Court ought certainly to interfere to prevent the nuisance complained of being committed. It is then said, that as Wm. Marriott had ceased to have any interest in the matters before the Court, he could not sustain the original bill; and it was further stated, that he ought not to have been joined with Phillips in the supplemental suit; but the case of *Dent v. Prudence* is an authority, that Wm. Marriott, after he has ceased to be a churchwarden, may continue the proceedings commenced by him, during the time he was in office, in respect of an act done during that time; and *Bodenham v. Ricketts* (11), which was a case before the Lords Commissioners in the year 1835, and afterwards before me in the spring of the present year, shews both the points, viz. that a churchwarden may prosecute a suit after he has quitted office, which he commenced whilst in office, for acts done during the time he was churchwarden, and that a churchwarden may intervene in proceedings instituted before he was appointed to that office. He cannot, however, institute an original suit in respect

of acts done before he became churchwarden. These proceedings had been instituted to compel payment of church rates, due for the years 1830 and 1835; the suit was abandoned in respect of the year's rates, during which the plaintiffs were not churchwardens, and they obtained a decree for the rates of the year in which they were churchwardens. I must therefore hold, that the suit in this case is rightly constructed, and that Wm. Marriott had a right to prosecute it after his office had expired; and as Phillips, who was chosen churchwarden in 1834, had an interest in the continuance of the injunction previously granted, I think the objections raised by the defendant to the substance of the suit are unavailing, and I should have thought a decree for a perpetual injunction ought to have been granted, but for this circumstance, viz. that an action was brought by Jakeman to determine the question of the right of way; but the only matters that were determined in that action, were the vicar's right and the general right of way, not the right of a church-way, which remains undecided. The Court of Common Pleas, on the certificate of Littledale, J. that he was satisfied with the verdict of the jury in Jakeman's action, declined giving the defendant a new trial; but if Tarpley wishes to institute further proceedings to try the right to a church-way, I should give him liberty to bring his action for the purpose of trying that right.

V.C. }
June 11, 19. } BOYS V. MORGAN.

Will—Construction—Special and general Residue.

Where a will is expressed in singular language, the construction to be put on it must depend on the whole of the context. The word residue construed to mean the residue of the testator's general personal estate, notwithstanding that word was immediately preceded in the will by a reference to part of the testator's estate, in the hands of his bankers at the time of making his will.

Effect of a direction by the testator to the object of his bounty to pay his debts.

(10) Carth. 151, 2 W. & M.

(11) Not reported.

The bill in this case, which was a supplemental one, was filed by the plaintiff as one of the next-of-kin of John Boys, embodying the original bill, which prayed that the transfer of certain stock might be declared void, and seeking to have it declared by the Court that the next-of-kin of John Boys were entitled to his clear residuary personal estate and effects, and that the same did not pass by his will; and that the defendant Eliza Morgan, as the executrix, according to the tenor of the will of John Boys, was a trustee of the residuary personal estate for her testator's next-of-kin. The will was contested in the Ecclesiastical Court, which decided in favour of its validity, and that the defendant Eliza Morgan was the executrix thereof, according to its tenor. To the bill a general demurrer was filed.

The will was as follows:—"To my friends and relations, who may be curious to inquire, be it known, that a few years back, of my own free will, I gave to Eliza Morgan, commonly called Castillo, all my furniture, table and bed linen, and apparel, plate, watches, and trinkets of any kind, then in my possession, and all my MSS., library, papers, &c., whatever have been added, and may hereafter be added previous to my decease, without any exception whatever, to her sole use and disposal, under promises from her, that she will take care that I shall never be in want of any article as long as I live. Having attained the eighty-second year of my existence, and finding the infirmities of age increasing, I desire to give her this voucher of the truth, that none may question or trouble her to make declaration of it. She knows that, thirty years ago, I agreed with Dr. Hector Campbell that he should have my carcase for chemical and anatomical experiments to be by him performed on it, if he could prevail on her to give it him. I have always had a mortal aversion to funeral pomp and expense, and therefore would rather be given away, with the sum a funeral would cost, for purpose of dissection and chemical experiments. I guess there is sufficient in my bankers' hands to defray and discharge my debts, which I wish Eliza Morgan to do, and to keep the residue for her own use and pleasure."

Large sums of stock had been trans-

ferred into the defendant's name in the year 1831 by the testator, but he did not mention that circumstance, or the sums, in his will.

Mr. Jacob and *Mr. J. Russell*, in support of the demurrer, contended, that the testator intended by his will to denude himself of every thing he possessed; and that by the word "residue," found at the conclusion of the will, was to be understood the clear residue of the testator's general personal estate after payment of his debts and funeral expenses.

Legge v. Asgill, Turn. & Russ. 265, note, and

Crooke v. De Vandes, 9 Ves. 198, and 11 Ves. 330.

were cited in support of the demurrer.

Mr. Knight Bruce and *Mr. G. Richards*, in support of the bill, contended, that by the word "residue," the testator intended only a special residue, viz. the residue of the funds in the bankers' hands at the death of the testator, after payment thereof of his debts: and cited—

The Attorney General v. Johnstone, Amb. by Blunt, 577.

Hastings v. Hane, 6 Sim. 67.

And they further contended, by reason of the statute 1 Will. 4. c. 40, relating to the residue of testators' estates, that the presumption in cases of this nature was against the executor, and that it was important that there was no direction to pay the debts out of the general personal estate.

THE VICE CHANCELLOR.—In this case I wished the matter to stand over after argument, that I might read through the pleadings, to see whether there was anything stated on the bill (the whole statement of which is admitted by the demurrer), which would vary the case, that is, make the case depend on anything else than the construction of the will; and it appears, on reading it over deliberately, that the right of the plaintiff solely and exclusively depends on the construction of the will.

The will is in a very singular form, and I must say, with reference to the cases that have been cited, that they really appear to be no otherwise applicable to this case, than to shew, that where wills are made in such a singular form as the wills in *Crooke v. De Vandes*, *Legge v. Asgill*, and

The Attorney General v. Johnstone, you must construe the expressions that are used as well as you can, by looking at the whole of the context.

Now, in this case, the testator sets out, first of all, by giving the world notice, and shewing, therefore, he was clearly aware himself, that he had friends and relations, that is, persons who might be naturally supposed to be objects of his bounty, or persons, on whom, if he made no disposition, his property would devolve.—[Here his Honour read the former part of the will.]—What the precise quantity of the gift here referred to by the testator was, certainly does not appear; but I cannot but myself think that the testator meant that whatever it was, it should at least receive confirmation by this his will, to the extent of his acknowledging the fact to be such. The testator then proceeds to say—[here his Honour read the remainder of the will, except the part relating to the funds at his bankers'].—Now, it is plain, I think, in the part of the will I have just read, that the testator considered that there was so much kindness and confidence reposed by him in Eliza Castillo, that he countermands his own personal inclination in favour of her wish, and rather than oppose her wish, he submits to have his body buried in the usual way, and, in effect, authorizes her to bury the body. “And I had rather,” says the testator, “be given away, with the sum a funeral would cost, for the purpose of dissection and chemical experiments.” I mention this, because it struck me at the hearing, as a strong circumstance, to shew that here he does evidently refer to the general personal estate, because he does in effect direct that Eliza Castillo shall bury him, and she could only bury him at the expense of the general personal estate. Then the testator says, “I guess there will be found sufficient in my bankers’ hands to defray and discharge my debts, which I hereby desire Mrs. Eliza Morgan to do, and keep the residue for her own use and pleasure.” It is quite obvious there is no direction here that the debts shall be paid only out of the fund which might happen to be in the bankers’ hands. I observe it is stated in the bill, and of course it is admitted by the demurrer, that at the date of his will the testator had at

his bankers’ more than sufficient to pay the debts which were then owing from him; but it is plain that the testator could not foresee what would be the amount of money in the hands of bankers at the time of his decease; and it is plain that he alludes in this sentence to the contingent sum, whatever it might be, “I guess there will be found sufficient in my bankers’ hands;” and therefore he was not referring to the amount that was then in his bankers’ hands, any further than that the amount, which was then in his bankers’ hands, might furnish him with more or less reason for guessing there would be found sufficient in the bankers’ hands to defray and discharge his debts; and it is obvious that the fund itself might vary as well as the amount of his debts. Then he takes a contingent view of the sufficiency of the sum in the bankers’ hands “to defray and discharge my debts;” and then immediately adds these words, “which I hereby desire Mrs. Eliza Morgan to do;” and he does not there direct that she shall only apply that fund which is in the bankers’ hands to the payment of his debts, but gives a positive and absolute direction that she shall pay and discharge his debts; and then follow these words, on which the discussion principally turns, “and keep the residue for her own use and pleasure.” It was said, the residue, plainly from the context, refers only to that which might remain of the fund in the bankers’ hands after satisfaction of the debts. But it seems to me, in the first place, that there is nothing which stints the words, “the residue,” to the residue of that fund, and as the testator has, by implication, in that part of his will in which he directs the expenses of the funeral to be paid, plainly referred, although not in express terms, but by implication, to all his personal property, it is clear, this residue might as well apply to the residue of the general personal estate, as to the residue of the fund in the bankers’ hands; and in the case in which the debts might happen to exhaust the money in the bankers’ hands, still the debts were to be paid, and I cannot but think, that the true construction is, that it is to be the residue of the property liable to pay the debts which will remain after payment thereof; of course, including

the funeral expenses, which by law, as well as by a plain implication, were to be paid out of the general personal estate; and I think that this construction is aided by the circumstance, that from the beginning to the end, though he does notice friends and relations, the sole object of bounty, the sole depository of confidence and trust, is Eliza Castillo, and therefore, on the true construction, she appears to me entitled to the residue.

Demurrer allowed.

On appeal, the Vice Chancellor's decision was affirmed by the Lord Chancellor.

V.C. }
June 11. } ORD V. LYON.

Practice.—Amendment of Bill—Jurisdiction—20th Order of the 21st December 1833.

Under the 20th of the orders of December 1833, the Master has jurisdiction to grant leave to amend, although the six weeks have expired, after which the answer is to be deemed sufficient.

Mr. Wigram and Mr. Hallett moved to discharge an order made by the Master, giving the plaintiff leave to amend his bill, no application made to him, more than six weeks after the answer of the defendant was to be deemed sufficient. Vide 13th order of November 1831, and 20th order of December 1833. Smith v. Webster (1) was cited as an authority for the motion.

Mr. Knight Bruce and Mr. Dixon, contra, contended, that Smith v. Webster did not apply to the case before the Court, but that Milbanke v. Stevens (2) was directly in point, and in favour of the Master's authority to make the order.

THE VICE CHANCELLOR.—The case of *Smith v. Webster* has no reference to the present question. The Master had no power over the 5th order of the Court of 1828, which says, "The party shall be considered as abandoning the exceptions, unless he refer them within six days."

(1) 3 Myl. & Cr. 244.

(2) 6 Sim. 160; s. c. 7 Law J. Rep. (N.S.) Chanc. 107.

The Judges of the Court have power over the general order; but this case raises a very different question from that discussed in *Smith v. Webster*, for the Master has certainly no power to alter the regulations of the Court, as found in the 5th order of 1828; but with reference to particular cases the Master is substituted for the Court. The Court has jurisdiction over its own orders, and the act of 3 & 4 Will. 4. c. 94. says, "The Master (not the Court) shall decide in certain cases in the first instance." With regard to any process under the 5th order of 1828, the Master must regulate himself by that order; but with respect to applications to amend a bill, withdraw replication, &c., the jurisdiction is taken away from the Court, and given to the Master (*vide* order, 20th of December 1833); and what the Court could have done before the last new orders were made, the Master may do now.

V.C. }
July 6. } MARTIN V. JARDINE.

Practice.—Common Reference of Title to the Master, on Motion—Form of Reference.

On motion for the usual order of reference as to title, it being objected that the answer stated that a good title could not be made, and that a question of costs would arise on the point of notice of no title before filing the bill, the Court ordered the usual reference to the Master, and directed, that if a good title could not be made, the Master should state when it was first shewn, that a good title could not be made, with liberty to state special circumstances as to the time when it was first shewn that a good title could or not be made to the estate contracted to be sold.

Mr. Knight Bruce moved for an order of reference as to the title of the defendant (the vendor) to the estate contracted to be purchased by the plaintiff. The bill was filed for the specific performance of the contract, and also prayed an injunction to stay the defendant's proceedings in an action of ejectment against the plaintiff, to recover possession of the estate contracted to be sold; and the answer stated that a good title could not be made, and set forth the

particular objections thereto, at some length. The estate formerly belonged to Mr. Elwes, from whom the defendant purchased the same. Mr. Elwes had been in the habit of making frequent exchanges of property in his parish, and to some of the property taken by Elwes in exchange, a good title could not be shewn, the same being a portion of the parish glebe land. The difficulties in the title were fully set forth in the answer, with two opinions of a conveyancing counsel, to whom the question of title had been referred by the agents of the plaintiff and defendant, and which were unfavourable to the defendant's title.

Mr. Jacob, for the defendant, contended, that the Master could do no more than had already been done; that the reference on motion could only be, whether there was a title or no title to the estate contracted to be sold; and that in the case before the Court, an important question would arise as to costs, the bill having been filed after it was well known that a good title could not be given.

Mr. Knight Bruce, in reply, observed, that his client would contend that the difficulties which had arisen to the completion of the purchase, were matters of conveyance only, and not of title; that the badness of the title was not to be taken for granted, because an allegation to that effect was contained in the answer; and that the injunction prayed by the bill to restrain the defendant's proceedings in the action of ejectment against the plaintiff, to recover the estate contracted to be sold, of which the plaintiff was at that time tenant to the defendant, was incidental to the relief sought.

The VICE CHANCELLOR made the common order of reference, with a direction, in case the defendant could not make a good title to the estate contracted to be sold, that the Master should state when it was first shewn that a good title could not be made, with liberty for the Master to state special circumstances, as to the time when it was first shewn that a good title could or could not be made to the estate in question.

V.C. } LORD KENSINGTON v. THE WEST
June 6. } LONDON CEMETERY COMPANY.

Execution of Power—Construction of Act of Parliament—Specific Performance.

By settlement on marriage it was provided, that the plaintiff, tenant for life, should have power to contract for the sale of and to convey any part of the lands in settlement, in case the same should, by virtue of any powers to be contained in any act of parliament, be required for the purposes of any railroad, canal, or other undertaking, &c. By an act of parliament, passed on the 15th of July 1837, and subsequently to the date of the settlement, certain persons, as an incorporated body, had power and authority given them to treat and contract for, and purchase and hold lands for the purpose of making a cemetery:—Held, that the making of a cemetery was an undertaking authorized by act of parliament, under the words of the settlement; and that the plaintiff was entitled to a specific performance of a contract for sale by him to the company of part of the lands in settlement.

By indentures of settlement, dated in October 1833, certain lands situate at Kensington, in the county of Middlesex, were conveyed to the use of the plaintiff for life, with a limitation to trustees to preserve contingent remainders, with remainder to his first and other sons in tail male; and it was thereby provided, that in case any part of the hereditaments should, under or by virtue of the powers contained, or to be contained, in any act or acts of parliament, be required by any person or persons, body or bodies politic or corporate, for the purposes of any railroad or railroads, canal or canals, or other undertaking of any description, for which the authority of parliament had been or should be obtained, then it should be lawful for the plaintiff, by any deed or deeds, to make sale and dispose of, to such person or persons, body or bodies politic or corporate, all such part or parts of the said hereditaments, as might be wanted or required for the purposes, or with a view to the purposes of such railroad or railroads, canal or canals, or other undertaking as aforesaid; and it was declared, that the plaintiff's receipt, in

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writing, should be a sufficient discharge for the purchase-money.

By an agreement in writing, dated the 5th day of July 1837, the plaintiff contracted with the committee and directors of the West of London and Westminster Cemetery Company to sell them a part of the hereditaments in settlement, for the purpose of enabling them to complete the intended cemetery. At the date of the contract, the committee were soliciting an act of parliament, authorizing the completion of their scheme. The act was passed on the 15th of July 1837, and thereby, after incorporating the proprietors, it was declared, that they should have power and authority to purchase, hold, and sell lands and other hereditaments, for the use of the said undertaking, without incurring any of the penalties or forfeitures of the Statutes of Mortmain," &c. By section 30 of the act, power was given to the company to contract for the purchase of not more than 100 acres of land.

Mr. Knight Bruce and *Mr. Romilly*, in support of the bill filed by Lord Kensington, to enforce a specific performance of the contract, stated, that the only point was, whether the making of the cemetery was an undertaking authorized by parliament under the words of the settlement.

Mr. Jacob and *Mr. Whitmarsh, jun.*, contra, contended, that if the company took under the execution of the power of sale contained in the settlement, they might, on the death of the plaintiff, be ejected by his son or grandson, inasmuch as they would not be bound by the contract of the plaintiff, unless this was an undertaking clearly contemplated by the settlement; that in railroad and canal acts of parliament, absolute power was always given to take the lands at once; that in the case of joint stock insurance companies, powers were given, by act of parliament, to purchase and hold lands, but not to take them absolutely and at once; that under the present act the company was incorporated, and licence was given it to hold a certain quantity of land in mortmain, but no power was given to the company to take the land; that there was nothing compulsory in the act, obliging the plaintiff to sell the lands, and if he were to be considered as having a power to sell

generally, he might exhaust the whole of the settled estate, which could not be intended; the company, however, it was added, were willing to complete the sale, if the Court were clearly of opinion that they were secure.

THE VICE CHANCELLOR.—The act of parliament says, in terms, that it shall be lawful for the company, with the consent of the owners of the lands required by the company, to make one cemetery; and part of the land sought belongs to the plaintiff as tenant for life, under the settlement in question; and by section 30 of the act, the company have power given them to treat for the lands; and it would be strange to say, that the lands in question are not required under the powers given by the act, when the act has actually empowered the company to treat, contract, and agree for the absolute purchase of such lands; and those lands being the lands in settlements, and, moreover, pointed out and described by the act as requisite for the purposes of the company. The company will have a good right to hold the lands in question, against the parties interested under the settlement, when the legal estate, which is now outstanding, shall be gotten in. The usual reference will, therefore, be made as to the title generally.

V.C. }
June 13. } SIMES v. DUFF.

Practice.—*Extension of common Injunction to stay Trial—Amendments.*

Exceptions taken to an answer were allowed, whereupon the plaintiff amended his bill, and obtained an order, that the defendant should answer the exceptions and amendments at the same time. The plaintiff, on the allowance of the exceptions, obtained the usual order for the common injunction, and afterwards obtained an order to extend the common injunction to stay trial until answer. The order to stay trial, held regular.

Quære, as to the correctness of Mellor v. Cresswell (1).

Mr. Jacob and *Mr. Younge* moved to discharge an order, granted by the Court,

(1) 2 Myl. & K. 616.

extending the common injunction to stay trial.—The common injunction was obtained by the plaintiff, on the allowance of exceptions taken to the defendant's answer, on the 9th of May 1838. The order to amend the bill, and for the defendant to answer the exceptions and amendments together, was dated the 12th of May, and the plaintiff afterwards applied for and obtained the order of the Court, extending the common injunction to stay trial. In support of the motion, the cases of *Mellor v. Cresswell* and *Brown v. Reina* (2) were cited; and it was alleged, that the obtaining of the common injunction for want of an answer to the original bill, and then extending it to stay trial on an amended and (as was the fact) totally different record, was vexatious, and an abuse of the practice of the Court.

Mr. Knight Bruce and *Mr. Tripp*, contra, contended, that no reason could be discovered for the decision of the Lord Chancellor in the case of *Mellor v. Cresswell*, and that his Lordship could not have intended to decide what he was reported to have determined in that case; that the defendant had brought the inconvenience on himself, by not putting in a full answer at once; that the case of *Brown v. Reina* had been misunderstood, and could not influence the practice of the Court; and that the common injunction, previously obtained, with its incidents, continued wherever the answer was found insufficient. *Newland's Chancery Practice*, vol. 1, p. 356, 3rd ed., 1830, was cited, referring to a case of *Martin v. Mortlock* (3), decided by Lord Eldon on the 13th of July 1815. That case was stated to be as follows:—"Order obtained for common injunction on the 22nd of June 1815. Order for referring the answer obtained on the 3rd of July 1815. Order for defendant to answer exceptions and amendments at the same time, obtained on the 10th of July; and the order to extend the common injunction to stay trial until answer filed, was dated the 13th of that month."

The VICE CHANCELLOR.—If the case, found in *Newland's Practice*, with the order

made thereon, had been quoted to the Lord Chancellor, instead of the case in the Court of Exchequer (the practice of which court does not bind this Court), his Lordship would certainly have made a different order in the case of *Mellor v. Cresswell*; and with regard to what has been said in support of the motion relative to the abuses that have occurred in the administration of justice, by reason of the facility of granting injunctions to stay trial on the allowance of exceptions, I can only say, that nothing was to be found in the questions framed relating to the inquiry into the practice of the Court of Chancery, on that point; and if such an abuse did really exist, it is odd that no step was taken towards remedying it by the Chancery Commissioners. My opinion is, that the order made in this case, to extend the common injunction to stay trial, is right, and consistent with the established practice of the Court; and the motion, therefore, must be refused.

L.C. }
July 11. } COOPER v. COOPER.

Practice.—Master's Report, Effect of Confirmation of.

Where the Master's report stated, that he had allowed the defendant, in his discharge as executor, payments amounting to a certain sum, "including therein" a particular item, which, from circumstances appearing on the face of the report, clearly ought not to have been allowed:—Held, that, inasmuch as the report had been confirmed, and no exceptions taken, the error could not be corrected on further directions.

William Joseph Cooper, by his will, gave certain property unto his son, the defendant, William Joseph Cooper, upon condition, that he should give his bond to such person or persons as his son, Henry Strachan Cooper, should appoint, "conditioned to be void on his articling or apprenticing at his expense the said H. S. Cooper to such profession or business as he might choose," and for payment to him of a certain sum of money on his attaining the age of twenty-one years.

By the decree, made on the hearing of

(2) 3 You. & Jer. 389.

(3) *Liber Regis*, fol. 158A.

the cause, it was (amongst other things) referred to the Master to inquire and state to the Court, whether the defendant, Henry Strachan Cooper, had been articted, apprenticed, or otherwise advanced, and if so, in what manner; and whether any, and what sum of money had been paid for that purpose, and by whom, and to whom, and out of what funds; and also, whether any bond had been given by the defendant, W. J. Cooper, to any person, and whom, conditioned for articling or apprenticing the said H. S. Cooper, and for payment to him of the sum of money directed by the testator's will; and whether anything, and what, remained to be done, or was fit and proper to be done in that behalf.

The Master, by his report, stated, amongst other things, as follows: that W. J. Cooper had made payments, as executor, out of the general estate of the testator, "the particulars of which sums so paid and applied, amounting in the whole to the sum of 4,124*l.* 8*s.*, are set forth in the sixth schedule to my report annexed, including therein the sum of 185*l.* paid for the outfit and incidental expenses of the said defendant H. S. Cooper, on his going to sea, hereinafter mentioned." The report subsequently stated the will, so far as it related to the bond to be given to Henry S. Cooper, and set forth certain affidavits made by him, and by the defendant, W. J. Cooper, from which it appeared, that no bond had been executed, and that H. S. Cooper had not been articted or apprenticed, but that the defendant, W. J. Cooper, had sent him to sea, and had paid the sum of 185*l.* for a premium to the captain of the vessel, and for his outfit and incidental expenses. The object and tendency of the affidavit of Henry S. Cooper was to shew, that what had been done for him by his brother was not tantamount to articling or apprenticing, and that he still remained liable to this obligation. The object and tendency of the affidavit of the defendant, W. J. Cooper, was to shew the contrary, and it concluded in these words:—"That, inasmuch as deponent was unable at the time the said Henry S. Cooper went to sea as aforesaid to advance the sum of 185*l.*, or thereabouts, out of the private resources of deponent; and, it being thought by all the family, and acquiesced in by them, that it would be

most advantageous to, and for the benefit of the said Henry S. Cooper to go to sea as aforesaid, *he, deponent, paid the said sum out of the general funds in his hands as executor and trustee of the said testator, and charged the same accordingly.*" The report further stated, that the said Master had duly considered the said testator's will, and the said affidavits as aforesaid read before him, and found, that the said defendant, H. S. Cooper, had been advanced in the manner stated in the said affidavits, but he found, that he had not been articted or apprenticed; and, further, that, inasmuch as the defendant, W. J. Cooper, had become a bankrupt, he was of opinion, that nothing was fit and proper to be done with respect to the said bond, or articling or apprenticing Henry S. Cooper.

Shortly after the date of the report, the defendant, H. S. Cooper, died an infant, and the report was absolutely confirmed, without any exceptions being taken as to the item of 185*l.*

The cause now came on for further directions.

Mr. Tinney, Mr. Bichner, Mr. W. W. Cooper, and Mr. G. M. Crawford, for different parties interested in the testator's estate, asked for a declaration, that the defendant, W. J. Cooper, ought not to have been allowed credit for the 185*l.* in the Master's report, and that he might be decreed to pay that sum to the general account of the testator's estate, in addition to the balance reported due from him. Many of the family interested in the testator's estate, were infants, and could not have consented to any such application of the general estate; and, in fact, the acquiescence by the family mentioned in the report, had reference only to the propriety of sending H. S. Cooper to sea in lieu of apprenticing him, and not to the fund, out of which the expenses were to come. There was no pretence whatever for deducting these expenses out of the testator's estate: and they contended, that, as this was a manifest error, the extent of which was exactly defined by the report itself, upon the face of which all the circumstances appeared, they were entitled, upon the authority of *Adams v. Claxton* (1), to have

(1) 6 Ves. 226.

the error corrected on further directions, notwithstanding that no exceptions had been taken.

Mr. Wigram and Mr. T. H. Hall, contra, said, that in *Adams v. Claxton*, the report had not been confirmed (2).

The LORD CHANCELLOR.—The facts appearing upon the report, dispense with the exceptions; but, after confirmation, there would be two inconsistent orders if any part of the report were to be altered. The Master has, under the reference to him, found the balance due from the executor, and how can I, in this state of the cause, alter that balance? I do not lay down any such rule, as that in no case of a false conclusion of law, apparent on the report, is *Adams v. Claxton* to be followed, when the report has been confirmed. I do not consider that question as now before me.

[See, however, *Turner v. Turner*, 1 Dick. 313, and the other cases cited in 1 Swanst. 156, note.]

V.C. }
July 24. } HOPKINSON v. PHIPPS.

Will and Codicil—Construction—Powers.

Held, from the recitals contained in a codicil, that a power to appoint was thereby given, although the words used by the testator were those only of substantive bequest.

General Twiss, by his will, bearing date the 21st of September 1816, which was duly executed and attested, directed that his trustees should stand possessed of such part of his personal estate as should consist of money, and of the monies to arise from his real estate and premises thereinbefore directed to be sold, upon trust, after payment of his debts and funeral expenses, to invest the residue in stock, and to stand possessed thereof as follows—viz. upon trust out of the interest and dividends thereof, to levy and raise during the life of his wife, such a sum as, together with what his wife was entitled to under her marriage settlement, would amount to a clear sum

of 2,000*l.* per annum; and subject thereto, the testator bequeathed to his daughter 10,000*l.*, to be paid at the end of twelve months next after the decease of his wife, with interest from the day of her death; and he directed, that his trustees should, during the life of his daughter, pay the interest and dividends of the residue of the trust monies, &c. into the hands of his daughter, or as she, notwithstanding her coverture, should appoint, for her separate use; and after his daughter's decease, the testator directed that the trust monies, interest, and dividends, subject as aforesaid, should remain in trust for the issue of his daughter, as she should appoint, and in case of no issue of his daughter, who should become entitled to the said trust monies, the same should remain in trust for his daughter during the life of his wife; and, if his daughter should die during the lifetime of his wife, then, after the decease of his daughter so dying in the lifetime of his wife, and such failure of her issue, in trust for his wife, during her life; and after her decease, then, except as to the sum of 10,000*l.* thereinbefore placed at the disposition of his said wife, and the sum of 15,000*l.* therein mentioned as owing to him on the joint and several bond of Edward Wood, Richard Wood, William Wood, and James Richard Wood, their father, and therein-after disposed of, upon such trusts as his daughter, by any deed or writing with or without power of revocation and new appointment, and to be by her sealed and delivered in the presence of and attested by two or more witnesses, or by her last will and testament, in writing, or any codicil thereto, or any writing in the nature of a will, to be by her signed and published in the presence of and attested by one or more witness or witnesses, should, from time to time, notwithstanding her coverture, direct or appoint; and, in default of such direction or appointment, and so far as any such, if incomplete, might not extend, then, as to one moiety of the trust monies and dividends, in trust for the executors, administrators, and assigns of his daughter, as part of her personal estate; and, as to the remaining moiety of the said trust monies and dividends, in trust for Elizabeth Wood, George Wood, Thomas Wood, Mary Wood, and Henry Wood, the five children of the

(2) This does not, however, appear from the report in *Vesey*.

testator's brother-in-law William Wood, and for Edward Wood, Richard Wood, and William Wood, the three children of his brother-in-law James Wood, their executors, administrators, and assigns, in equal shares, as tenants in common. The testator then declared, that his wife should have power to charge the trust monies with the payment of 10,000*l.*, as she should appoint.

In a subsequent part of his will, the testator declared, that, in the meantime, and until all the messuages, lands, and hereditaments therein mentioned, should be sold under the trusts thereinbefore declared, Walter Ferraud should have the entire management and superintendence over the same or such part thereof as should, for the time being, be unsold; and he directed the trustees, when required in writing by the said Walter Ferraud, by deed, to demise or lease the said messuages, &c., or such part thereof as should, for the time being, be unsold. And the testator declared, that, in the meantime, and until the messuages, &c. should be sold, the trustees should receive the rents thereof, or of such parts thereof as should be unsold, and pay one equal third part of so much of the rents as should arise from the premises at West Sawcock to Walter Ferraud, as a remuneration to him for his trouble, and stand possessed of the remainder of the said rents, upon and for such and the same trusts as thereinbefore expressed, concerning the interest and dividends of the trust monies, &c. thereinbefore mentioned; and the testator appointed George William Phipps and John Hardy and his wife, executors and executrix of his will.

The testator afterwards duly made a codicil, which was indorsed on his will, and which was as follows :—"This, my codicil, I direct shall be taken as part of my will. Whereas, I have, in and by my said will, given to my daughter 10,000*l.* to be paid at the end of twelve months after my decease, and the further sum of 10,000*l.* at the end of twelve months after the death of my wife; and also, I have given to her certain parts of my real and personal estate, in such manner as is within mentioned, now, in case my daughter shall happen to die before me, or before she shall have exercised the powers and authorities within

given to her, then I give, devise, and bequeath unto the said Walter Ferraud, the said legacies of 10,000*l.* each, and also all my estate, both real and personal, which I have in and by the within will given, devised, and bequeathed to my daughter, to hold to him, his heirs, executors, administrators, and assigns, according to the nature and quality of such estates respectively, it being my mind and will that the said Walter Ferraud shall stand precisely in the same situation as my daughter would be in case she were living; and I do hereby ratify and confirm my will in every respect, except so far as the same is hereby revoked or altered."

The testator's daughter died in the lifetime of the testator—viz. in February 1827, leaving Walter Ferraud her surviving, who afterwards married again. The testator died in March 1827, without having revoked his will, except as appears from the codicil, and without having revoked his codicil; and his widow died in July 1835, without having executed the power of appointment given to her by the will as to the sum of 10,000*l.* Walter Ferraud made his will, bearing date the 4th of December 1834, duly executed and attested, and thereby devised and bequeathed all his residuary real and personal estate and effects to the plaintiff Hopkinson, and the defendant Charles Turner, in trust for the co-plaintiffs as therein mentioned. By a codicil to his will, dated 15th of July 1835, and duly executed and attested, as was required by will of General Twiss, after reciting the power given by the will and codicil of General Twiss, Walter Ferraud absolutely gave and bequeathed unto the plaintiff Charles Hopkinson and Charles Turner, all and every the stocks, funds, and securities, monies, and effects whatsoever, which, by virtue of the said will and codicil, or either of them, or otherwise howsoever, he had power to direct and appoint, or otherwise give, bequeath, or dispose of, to hold the same to Hopkinson and Turner, their executors, administrators, and assigns, upon the trusts, intents, and purposes, in and by his will expressed and declared, concerning the residue of his monies, personal estate, and effects.

Walter Ferraud died in September 1835, and his widow, Margaret Ferraud, and

Hopkinson, and the defendant Charles Turner, duly proved his will and codicil.

The surviving children of James Wood and William Wood named in General Twiss's will, and living at his death, claimed a moiety of the Sawcock estate, or the monies produced by the sale thereof, and of all other the residuary real and personal estate of General Twiss, under his will, and insisted, that Walter Ferraud, under the will and codicil of General Twiss, had no power to appoint or dispose of the estates, &c., given and bequeathed by the will of General Twiss; or, if he had, that he had not duly exercised such power; and Charles Turner and Thomas Turner, as the personal representatives of Elizabeth Turner, the next-of-kin of General Twiss, living at his death, insisted, that, by the death of Richard Wood and William Wood the younger, in the lifetime of General Twiss, the shares of the residuary estate and effects given to them lapsed, and were undisposed of by General Twiss's will, and that he died intestate as to such shares, and that the same became divisible between them and Elizabeth Twiss, according to the Statute of Distribution.

The bill, after stating the above facts and circumstances, prayed a declaration by the Court, that, under the will and codicil of General Twiss, Walter Ferraud had full power to appoint, or otherwise devise and bequeath the Sawcock estate or the monies to arise from the sale thereof, and also, that he had power under the same will and codicil to appoint, give, and bequeath a moiety of the clear residuary personal estate of the testator, General Twiss; and that it might be declared that the codicil to W. Ferraud's will was a valid execution of the power mentioned in General Twiss's will and codicil, and that the Sawcock estate, and also the clear residue of the said testator's estate and effects were, by the codicil to W. Ferraud's will, well appointed in favour of the parties plaintiffs therein mentioned.

The cause having stood over to make the heir-at-law of General Twiss a party, it now came on to be heard.

Mr. Knight Bruce and *Mr. Wigram*, for plaintiffs.—The question simply is, what is the meaning of the words in the codicil

of General Twiss—viz. "the said W. Ferraud to stand precisely in the same situation as my daughter would be, in case she were living," coupled with the preceding part of the codicil? The expression used in the former part of the codicil is not a "moiety of my estates," but "all my estate," giving thereby an entirety. The daughter had a general unlimited power given her by her father's will, and W. Ferraud exercised the power given him by the codicil in favour of the plaintiffs.

Mr. Jacob and *Mr. James Russell*, for the defendants, the surviving child of James Richard Wood, and the children of William Wood, insisted, that the defendants were entitled to one moiety of the Sawcock estate, and of all other the clear residuary real and personal estate of General Twiss, under his will; and that, under the codicil of General Twiss, Walter Ferraud had no power to appoint, or give or bequeath any part of the estates, stocks, funds, or securities given or bequeathed by the will of General Twiss, and that he had not exercised such power in a valid manner. They contended, that the words in the codicil of General Twiss, "to hold to him, his heirs, executors, administrators, and assigns," could not be construed a power—that the matter was not intelligible as a power, unless those words of limitation were rejected—that if the daughter had issue born after the date of the codicil, the Court could not say such issue were intended to be excluded, and that the power of appointment did not arise to the daughter, except in case of her dying without issue—that the "powers and authorities" mentioned in the codicil, referred only to the moiety given to W. Ferraud—that W. Ferraud only took the property, *quâ* property which the daughter would have taken had she lived, the words being nothing more than those of direct substantive bequest.

Mr. T. Turner appeared for the personal representatives of Elizabeth Turner, the next-of-kin of General Twiss at the time of his death.

Mr. Griffith Richards, for the heir-at-law of General Twiss, claiming the shares of the two Woods, who died during the testator's lifetime, contended, that the fair interpretation of the codicil was, that W.

Ferraud was to stand in the situation of the daughter as to the property actually bequeathed by the testator, and not further.

The VICE CHANCELLOR said, he could not see the difficulty of the case. The will (his Honour continued) having been made, the codicil of General Twiss, the testator, sets out with declaring what he had done by his will—[His Honour here read the former part of the codicil].—Nothing is more plain than that if the codicil of General Twiss had rested there, everything given by the will to the daughter would have been given to Walter Ferraud, according to the qualities of real and personal estate. So far, there was no ambiguity.—[His Honour then read the latter part of the codicil.]—The question in the case before me is, whether you are to construe the sentences in the codicil in any other way than that W. Ferraud should have and take by virtue of that codicil whatever the daughter would have had and taken by the will had she lived; and, I cannot but think, that, as by the reciting part of the codicil, the testator takes notice of the “powers and authorities” given by his will to his daughter, he intended, that, whatever the daughter would have taken under the will, W. Ferraud should have under the codicil, whether by way of gift, or power, or authority. It is quite reasonable that W. Ferraud, being substituted for the daughter, should have the same powers as the daughter would have had if she had lived. A modified alteration only of the will was intended by the testator, and the natural construction of the codicil is to give to W. Ferraud the same property and powers as were given to the daughter by the will.

V.C. }
 July 27. } MATHER v. PRIESTMAN.

Insolvent Debtors Act, Section 20—Private Contract—Sale of Insolvent's Real Estates.

A sale of an insolvent debtor's real estates by his assignees by private contract, is valid, notwithstanding the direction contained in the 20th section of the Insolvent Debtors Act, for the sale thereof by public auction.

The plaintiffs were the assignees of William Iveson, an insolvent debtor, who received his discharge under the provisions of the Insolvent Debtors Act (7 Geo. 4. c. 57) on the 3rd of March 1836. Iveson on the 30th of Dec. 1835, the date of the assignment to the provisional assignee of his estate and effects, was seised in fee at the will of the lord, according to the custom of the manor of Burstwick, of divers messuages and hereditaments. The provisional assignee, on the 18th of March 1836, conveyed all Iveson's estate and effects to the plaintiffs for the benefit of Iveson's creditors.

At a meeting of the creditors, duly convened as required by the act, and holden on the 19th of July 1836, a resolution was passed by the major part in value of the creditors present, and they directed the plaintiffs to sell all or any part of the insolvent's real and personal estate, either by public auction or private contract, and in one or more lot or lots, and at any sale by auction of all or any part of the real estates, to buy in, and again to offer for sale in like manner the whole or any part of the said estates. The plaintiffs put up the estates comprised in the agreement next mentioned, for sale by public auction on the 29th of May 1837, but the same were not sold, there being no adequate sum bid for them. By memorandum in writing, dated the 14th of December 1837, duly signed, the plaintiffs agreed to sell, and the defendant to purchase the copyhold hereditaments, being Lot 1, in certain particulars of sale, part of the insolvent's estate, at the sum of 2,850*l.*, and also certain other hereditaments, being Lot 4, at the sum of 250*l.* The bill, after stating the foregoing facts, charged, that the defendant was desirous of completing his contract if the plaintiffs had power to enter into the aforesaid contract for sale of the estates; but that defendant alleged, that, by the provisions of the act or acts then and still in force for the relief of insolvent debtors, the plaintiffs, as such assignees, had not any power to sell any part of the real estates of the insolvent by private contract, and that all such real estates ought, according to the provisions of the said act, to have been sold by public auction. The bill then charged, that the time within which the

plaintiffs were authorized to sell the real estates of the insolvent, had been, by several orders of the Insolvent Court, extended from time to time, and that the last order expired on the 1st of January 1838, and that, at a meeting duly convened for that purpose, in pursuance of the said act, the plaintiffs had been authorized to institute the present suit for the purpose of obtaining a specific performance of the contract for sale, and that the institution of the suit had also received the approbation of the Court for the Relief of Insolvent Debtors in England, as required by the said act, and prayed a specific performance of the contract.

The defendant, by his answer, admitted all the material facts stated in the bill, and that he was desirous, in case the plaintiffs should make out and prove a good title to the premises, of completing his contract; but he had been advised by counsel, and submitted, that the plaintiffs, being the assignees of an insolvent debtor, had no power to sell any real estate belonging to such insolvent otherwise than by public auction, and that, therefore, the agreement was void and of no effect; but that if the Court should be of opinion that the sale by private contract was valid and unimpeachable, still the defendant submitted, that he was entitled to have a good title shewn in other respects.

Mr. Knight Bruce and *Mr. Bethell*, for the plaintiffs, insisted, that the 20th, as also the 24th section of the act, 7 Geo. 4. c. 57 (the Insolvent Debtors Act), were only directory, and intended only to have operation as between the assignees and the creditors; and cited *Piercy v. Roberts* (1), and *Casborne v. Barsham* (2).

Mr. Griffith Richards, for the defendant, cited *Waldron v. Howell* (3).

HIS HONOUR was of opinion, that there was no ground for the defendant's objection to complete his purchase, for the 20th section of the Insolvent Debtors Act speaks in general language of the insolvent's estate and effects: the material words used there being, "that the assignees shall, with all

convenient speed, use their best endeavours to receive and get in the estate and effects of the prisoner, and shall, with all convenient speed, make sale of all such estate and effects"; this is a general direction to make sale of all the insolvent's estate and effects. The same section then proceeds to direct, that within a certain time the insolvent's "real estate shall be sold by public auction;" but the act nowhere says that it may not be sold in any other manner. The general direction contained in the early part of the 20th section of the act is in full force, notwithstanding there is the subsequent special direction with reference to the insolvent's real estate.

V.C. }
June 6, 23. } COWLEY v. COWLEY.

Practice. — Pleading — Co-plaintiffs — Dismissal of Bill — Want of Interest in subject of Suit.

Where two parties file a bill, one of them claiming an interest under a deed of gift, and also under a will, the other claiming an interest under the will only; and it is held, that neither of the parties takes any interest under the will, but that one of them has established an interest under the deed of gift, — the bill must be dismissed, but without costs; the objection of want of interest not being taken by the answer.

In this case, the bill was filed by *Mary Cowley*, widow, and *Lovell Cowley*, praying payment of an annuity of 40*l.*, to which *Mary Cowley* was entitled, under a deed of gift executed by her husband, *John Cowley*, in 1809, and also payment of the sum of 100*l.* and interest, and of another annuity of 50*l.*, which *Mary Cowley* claimed under the will of *John Cowley* her husband (since deceased). The other plaintiff, *Lovell Cowley*, claimed payment of a sum of 200*l.* under the will only, and made no claim of interest under the deed of gift. The testator *John Cowley's* will was dated in 1829, and he died in 1835; and the question in the cause was, whether *John Cowley*, his son, took the fee simple under the deed of gift, or a life estate only, for want of words of inheritance. The Vice Chancellor having decided, that the

(1) 1 Myl. & K. 4; s. c. 2 Law J. Rep. (N.S.) Chanc. 17.

(2) 6 Sim. 320.

(3) 3 Russ. 380.

dealing between the parties amounted to a family arrangement, and that John Cowley, the son, took the estate absolutely under the deed of gift, the consequence of which was, that nothing passed by the testator's will, and that, therefore, Lovell Cowley had no interest in the suit, it became a question what the decree ought to be, and whether Mary Cowley alone could sustain the suit, and was entitled to a decree for the amount due to her, under the deed of gift.

Denton v. Davy, 1 Moo. P.C. 15.

Gemmel v. Block, 2 Dick, 513, were cited.

Mr. Jacob and *Mr. Koe* for the plaintiffs.

Mr. Knight Bruce and *Mr. Blunt* for the defendant John Cowley; and

Mr. F. J. Hall for the defendants Roberts and wife, claiming an interest both under the deed of gift and the will also.

June 23.—The VICE CHANCELLOR, this day, said, he had conferred with the Lord Chancellor on the point of pleading in this case; and it seemed to them that the bill ought to be dismissed, but without costs, on account of the objection of want of interest not being raised by the answer.

V.C. }
June 15. } *SAMPSON v. SMITH.*

Practice.—Demurrer—Pleading—Parties—Nuisance.

A plaintiff files his bill against the defendants, engineers, complaining of the large quantity of smoke daily issuing out of a chimney belonging to the defendants, and connected with a steam-engine, situate on the defendants' premises, and describing it as a grievous nuisance, both to himself as well as to the other inhabitants of the neighbourhood:—Held, that it was not necessary to make the Attorney General a party to the suit; and that the words in the bill, relating to the smoke being a public nuisance, might be considered surplusage.

The bill in this case stated, that the plaintiff occupied the house, No. 2, on the east side of Princes Street, Leicester Square, and had daily exposed there for sale a valuable stock of clothes and furni-

ture, and that the defendants, Andrew Smith and John Lionel Hood, were in the occupation of a tenement, manufactory, and premises on the west side of the same street, near the plaintiff's dwelling-house, and there carried on business, under the style of engineers and patentees of steam-boats of a new construction for inland navigation, locomotive steam-engines, &c.; and that, previous to March 1838, no material injury or nuisance was occasioned by it, but that, since the said month of March, a large body of smoke constantly issued from the defendants' chimney, which was not so high as the roofs of the adjoining houses, and the soot and blacks arising therefrom filled the plaintiff's house, and materially injured his merchandise and furniture. The bill then proceeded to allege, that the evil had recently increased, and become a grievous nuisance to the plaintiff, and also to the other inhabitants of the neighbourhood; and prayed that the defendants might be decreed to abate the nuisance, and be restrained from using the steam-engine in such manner as to occasion the continuance of the nuisance to the plaintiff.

The defendants filed a general demurrer to the bill, and also demurred *ore tenus* for want of parties.

Mr. Jacob and *Mr. Willcock*, in support of the demurrer, contended, that this was a case of novelty, a nuisance being complained of, as arising from smoke issuing from a fire made of coal, and not from the manufactory of soap-ash, or any other matter likely to be prejudicial to the atmosphere and health of the plaintiff, and those resident in the vicinity of the defendants' place of business; that in the present case the Court ought not to interfere before there had been an investigation in a court of law, and cited—

Baines v. Baker, Blunt's Amb. 159.

The Attorney General v. Cleaver, 18 Ves. 211.

Cronder v. Tinkler, 19 Ves. 617.

Weller v. Smeaton, 1 Cox, 102.

The Earl of Ripon v. Hobart, 3 Myl. & K. 169; s. c. 3 Law J. Rep. (N.S.) Chanc. 145; and

Spurrier v. Pratt, V.C. Nov. 26, 1836. And they further contended, that, considering the allegations in the bill of the

nuisance being general in its nature, the proceeding ought, according to the authorities on the subject, to be instituted by the Attorney General, as a public officer, and not by a single individual; and that, even if the plaintiff had a separate case of nuisance, and one distinct from the public, as occurred in *Crowder v. Tinkler*, still the Attorney General ought to be a defendant, and that, therefore, the record was defective; that in the case of *Spencer v. the London and Birmingham Railway Company*, (1), a special nuisance was proved against the defendants.

[The VICE CHANCELLOR. — The only point I wish to hear any observation upon, on the part of the plaintiff, is, as to the necessity of the Attorney General being a party.]

Mr. Knight Bruce and *Mr. Dixon*, for the plaintiff, then contended, that no rights of the Crown were affected so as to require the presence of the Attorney General; that although it might be necessary to proceed in the case by indictment, still the rights of private individuals, who had sustained particular damage, to bring their actions, remained untouched; that the bill was framed for the purpose of obtaining protection for the plaintiff, and not the public at large; that the private nuisance in this case was distinguished from that which was of a public nature — *The King v. Downsap* (2); that in *Spencer v. the London and Birmingham Railway Company*, the nuisance was of a public nature, but the act, as done to the plaintiff, was a private wrong also; and that what was alleged in the present bill, with reference to the steam-engine being a public nuisance, was mere surplusage.

The VICE CHANCELLOR. — Upon the best attention I can give this case, I do not think that this demurrer can stand. If the case were the converse of what it is, and a party had done that with reference to which the question would arise, whether it amounted to a public nuisance or not, and a bill had been filed accordingly, the point whether the Attorney General was a necessary party, might, in such a suit, be set at rest by a decision of the question, whe-

(1) V.C., not yet reported.

(2) 16 East, 196.

ther the act done was a public nuisance. This is not the case of a bill filed to restrain several persons from proceeding in actions brought by them against the plaintiff; here the plaintiff files his bill, and charges that the nuisance in question is injurious to himself in particular, and a grievous nuisance to the other inhabitants of the neighbourhood, which last was an unnecessary allegation. In a case so constituted, I do not see, if the Attorney General were made a party to the suit, how it would assist me in the decree to be made then; and unless, having the Attorney General before the Court, I could pronounce a decree which would bind the Attorney General and the public at large, in respect of the subject of the suit, I think the Attorney General ought not to be a party to it; and therefore the demurrer must be overruled.

Demurrer overruled.

M.R. } THE BANK OF ENGLAND v.
June 16. } BOOTH.

Banker—Bill of Exchange—Bank of England.

A bill of exchange, at a date less than six months, drawn by a banking company, carrying on business in Upper Canada, was accepted by G. P, the manager of the London Joint-stock Bank, in the words:—"Accepted at the London Joint-stock Bank. G. P." P. was not a partner in the London Joint-stock Bank, but that company had given a guarantie to the bank in Canada, to provide funds for the payment of all the bills drawn by them upon and accepted by G. P.

Held, that such acceptances were infringements on the privileges of the Bank of England, under the 3 & 4 Will. 4. c. 98.

The facts of this case and the objects of the bill, are sufficiently set forth in the judgment of the Master of the Rolls.

The plaintiffs applied to the Court for an injunction, following the words of the prayer of the bill.

Mr. Pemberton, *Mr. Maule*, and *Mr. G. Richards*, supported the motion.

Sir W. W. Follett, *Mr. Kindersley*, *Mr. Willcock*, and *Mr. Duckworth*, appeared for the defendants.

The following cases were referred to :
Bramah v. Roberts, 1 Bing. N.C. 481 ;
 s. c. 1 Scott, 350 ; 3 Dowl. P.C. 392 ;
 6 Law J. Rep. (n.s.) C.P. 346.
Thomas v. Bishop, 2 Str. 955.
Emly v. Lye, 15 East, 7.
Jackson v. Hudson, 2 Campb. 447.
Denton v. Rodie, 3 Campb. 493.
South Carolina Bank v. Case, 8 B. & C.
 427 ; s. c. 2 M. & R. 459 ; 6 Law J.
 Rep. K.B. 364.
Ducarrey v. Gill, 1 Moo. & Mal. 450 ;
 s. c. 4 C. & P. 121.
Wilson v. Barthrop, 2 Mee. & W. 863 ;
 s. c. 6 Law J. Rep. (n.s.) Exch. 251.
Fairlee v. Herring, 3 Bing. 625 ; s. c.
 11 Mo. 520 ; 4 Law J. Rep. C.P.
 204.
Hubbard v. Johnstone, 3 Taunt. 177.
The King v. Younger, 5 Term Rep. 451.
The Corporation of Berwick v. Johnson,
 Lloft, 334.
Lyon v. Sundius, 1 Campb. 423.
Johnson v. Collings, 1 East, 98.
Leadbitter v. Farrow, 5 Mau. & Selw.
 345.

THE MASTER OF THE ROLLS.—The object of the motion made by the Bank of England, in this case, is to restrain the London Joint-stock Bank from borrowing, owing, or taking up in England, any sum of money on their bills of exchange, payable on demand, or at any time less than six months from the borrowing thereof. The London Joint-stock Bank is a partnership consisting of more than six persons, who carry on the business of bankers in London. Mr. George Pollard is their manager, but is not a partner or a shareholder. The Commercial Bank of the Midland District, is a banking partnership, carrying on business at Kingston, in Upper Canada. Mr. John S. Cartwright is their president, and Mr. F. A. Harper is their cashier.

In the Spring of 1837, the Commercial Bank desired to employ the London Joint-stock Bank as their London agents, and to obtain from them advances of money to a large amount, and for that purpose to draw upon them bills of exchange, payable sixty days after sight. The London Joint-stock Bank conceiving, that to accept such bills might be a violation of the privileges

enjoyed by the Bank of England, and having been apprised by the Bank of England, that that would be so considered by them, by letter, dated the 6th day of May, and addressed by Mr. Pollard to Mr. Harper, proposed to the Commercial Bank to adopt either of these two expedients : first, that the Commercial Bank should issue promissory notes, payable at the Joint-stock Bank ; or, secondly, that the Commercial Bank should draw upon "George Pollard, manager of the London Joint-stock Bank, London ;" and that the due payment of the manager's acceptances should be guaranteed by the London Joint-stock Bank. In answer to these proposals, the Commercial Bank, in a letter dated the 21st of June 1837, and addressed by Mr. Harper to Mr. Pollard, expressed themselves as follows :—"The Bank have also taken into consideration both the modes you propose for valuing on you, so as not to come within the power of the act in favour of the Bank of England, and prefer that of drawing on you as manager, at sixty days sight, being the dates at which bills are commonly negotiated, and which the public would prefer. Such being their decision, please to send out the guarantee of your bank, to protect the drafts of the president of this institution." In anticipation of the guarantee being sent, John S. Cartwright, the president of the Commercial Bank, drew upon George Pollard a bill of exchange, which was expressed as follows :—

"1,000*l.* sterling. Kingston, Upper Canada, 25th of July 1837. Sixty days after sight, pay this my first of exchange, (second and third unpaid,) to the order of F. A. Harper, cashier, the sum of 1,000*l.* sterling, value received, which place to the account of the Commercial Bank Midland District, with or without further advice. John S. Cartwright, president. To George Pollard, Esq., manager, London Joint-stock Bank, London."

About the time when this bill was drawn in Canada, the London Joint-stock Bank received the letter of the 21st of June, containing the information, that the Commercial Bank preferred the mode of valuing, by drawing bills on George Pollard, as manager ; and, thereupon, by letter, dated the 29th of July 1837, and addressed by

Boyle, their secretary, to the president and directors of the Commercial Bank, they communicated to the Commercial Bank their approbation of the mode of drawing, which the Commercial Bank had selected, and sent to Canada a guarantie signed by six trustees, and expressed as follows :—

“To the Commercial Bank of the Midland District, Upper Canada. London, 26th of July 1837.

“Gentlemen,—In consideration of your keeping a banking account with the London Joint-stock Bank, we, as trustees of the company, hereby engage, that the capital, stock and funds of the company shall be liable to you for, and shall make good any balance that may be due to you on your current or other accounts with them; and that the said London Joint-stock Bank will provide on your behalf the necessary funds to pay at maturity all such bills as may be drawn by your bank upon, and accepted by Mr. George Pollard, manager of the said London Joint-stock Bank. We are,” &c. Signed by six trustees.

They also sent to the Commercial Bank the form of an agreement, which, in the month of September following, was duly signed, whereby the Commercial Bank agreed to pay to the trustees of the company, on demand, such sums of money as might at any time be due from them to the London Joint-stock Bank; and advertisements, stating the connexion between the two companies, but not adverting to the peculiar nature of those arrangements, as to bills of exchange, were published. The bill of the 25th of July 1837, was received by the Bank of England about the end of September, and was presented for acceptance on the 2nd of October, and was then accepted by Mr. Pollard, in the manner and form following :—“Accepted, 2nd of October 1837, at the London Joint-stock Bank. George Pollard.” The Bank of England objected to the form of this acceptance. Mr. Pollard refused to alter it, and after some discussion, the bill was paid under discount. The London Joint-stock Bank, however, now carry on and claim to be entitled to carry on their business as agents of the Commercial Bank in Canada, and they make a claim to be entitled to make such advances to the last-mentioned bank, upon or by means of bills of ex-

change, drawn on George Pollard, and accepted by him under the arrangement and the guarantie before mentioned; and the only alteration made or proposed to be made, in the form of the bill, is to omit the word “manager,” in the address of George Pollard. The question is, whether this course of proceeding is legal under the Bank Acts, the last of which, is the stat. 3 & 4 Will. 4. c. 98. This Act, after referring to former acts, in section 3, permits any partnership (although consisting of more than six persons) to carry on the business of banking in London, provided that such partnership do not, during the continuance of the privileges of the Bank of England, borrow, owe, or take up in England, any sums or sum of money on their bills or notes payable on demand, or at any time less than six months from the borrowing thereof. The effect of that clause was much considered in the case of *The Bank of England v. Anderson* (1), and not being aware of any reason for doubting the judgment of the Court of Common Pleas, in that case, I must, on the present occasion assume, that it was rightly decided, and it is unnecessary for me to refer to the particular arguments there used. The London Joint-stock Bank being a partnership consisting of more than six persons, and carrying on the business of banking in London, and the bills which are accepted by Geo. Pollard, in the course of the dealing before described, being payable sixty days after sight, the question seems to be reduced to this, whether in the course of this dealing, and in respect of bills so accepted, the London Joint-stock Bank do or do not owe money in England on their bills. As the Bank Acts were made for the purpose of giving effect to an agreement between the Bank of England and the public, for which agreement, valuable consideration was given by the Bank of England, the acts must be construed, and effect must be given to them, according to the intent and meaning of them, so far as the intent and meaning can be discovered, by fair and just construction; and it must be observed it was argued for the plaintiffs, that if the expedient which has in this case been adopted for evading the statute should

(1) See next case.

be successful, there seems to be no reason why the defendants, the London Joint-stock Bank, should not, in the name of their agent, Mr. Pollard, issue promissory notes payable on demand to any amount; and it would not be difficult to suggest indirect means, by which such notes might be made to circulate on the credit of the company. It is admitted on behalf of the London Joint-stock Bank, that their object has been and is to avoid the provisions of the Bank Acts. They allege, that accepting bills in the manner before described, is not within the strict letter and meaning of the act, and that they have a right to do everything which is not strictly and directly forbidden; and their argument is, that as the London Joint-stock Bank are not by that name and in that character parties to the bills, the bills are not theirs, and they do not owe money upon them. But, admitting that the indorsee, a stranger to the transactions and arrangements between the London Joint-stock Bank and the Commercial Bank, who had not received the bill on the credit of the London Joint-stock Bank, would have no right to consider the London Joint-stock Bank as acceptors of or parties to the bill, the question is not thereby disposed of. It is to be considered what is the relation between Mr. Pollard, the Joint-stock Bank, and the Commercial Bank, in these transactions, and in respect of these bills. Mr. Pollard is a mere agent, without any personal interest whatever; his office is to do something by which the two banks are enabled to transact their business together, in the manner they desire; he does this by the authority and for the profit of the London Joint-stock Bank; he was never meant to be primarily, if at all, liable to the Commercial Bank, the drawers of the bills; as between him and them he has entered into no contract to pay; he and they rely on the London Joint-stock Bank, who have not contracted to become liable in case of his failure to pay, but have contracted to provide a fund for the bills, when they arrive at maturity, and to do that which would belong to them, or would be their duty if they were acceptors, and the bills were avowedly drawn in a transaction for the purposes of their business, as agents and correspondents of the Commercial Bank; and under these cir-

cumstances, I think, that the bills may, without impropriety or any strain of language, be called their bills; their names are not upon the bills as parties, but they are the persons who authorize the drawing, authorize the acceptance, are bound to provide for the payment, and are entitled to the profit arising from the acceptance, and payment of the bills. I have no doubt that they considered those bills as their bills, at least in the sense of their having to provide funds for paying them; and for the purposes of the Bank Acts, I think, that the law must also consider the bills to be theirs. It appears to me also, that they owe money upon the bills when accepted; for although they are not parties, and may not be liable to an indorsee who has not received the bills on their credit, yet, as regards the drawers, they are under an obligation to do that which is equivalent to payment—that is, to provide the fund to enable their agent to pay. Their obligation arises upon the acceptance by their agents. They then owe or become liable to pay (in this case the expressions are equivalent) the sum which is due upon the bills. In all transactions and accounts between the two banks, the existence of the obligation or liability, must undoubtedly be recognized, and if they neglect the duty they thus contract to perform, they are answerable to the drawer. It was argued, indeed, that the London Joint-stock Bank not being parties to the bills, cannot be sued upon the bills themselves, and for that reason cannot be deemed to owe money upon the bills. The engagement to provide the money for payment is collateral, and the obligation upon that collateral agreement is no obligation upon the bank. I, therefore, certainly do not think it necessary to give any opinion upon the question, whether the London Joint-stock Bank can be sued directly upon such bills as these or not. For the reasons I have stated, it appears to me, that they owe money upon the bills; and I think, that this conclusion is in no way affected by the form of the action or suit, in which they might be compelled to satisfy their obligation.

On the whole, therefore, I am of opinion, that the privileges to which the Bank of England is entitled, by virtue of their

agreement with the public, confirmed by statutes, are violated by such acceptances as have been made in this case; and that, therefore, an injunction ought to be awarded to protect the Bank of England against this violation. I, therefore, order that an injunction be awarded to restrain the society or partnership of the London Joint-stock Bank, and every partner therein, and the defendant George Pollard, and every clerk, servant, or agent, in the said partnership, from accepting or causing to be accepted, in the name of the partnership, or in the name of the said George Pollard, or in any other name in the course of their banking transactions, any bill or bills of exchange payable on demand, or at a less time than six months from the acceptance thereof.

M. R. }
 April 19, } THE BANK OF ENGLAND v.
 1837. } ANDERSON.

Banker—Bill of Exchange.

An acceptance by a co-partnership consisting of more than six persons, carrying on the trade or business of bankers, within the distance of sixty-five miles from London, in the course of such trade or business, of a bill of exchange at a date less than six months, is illegal under the 3 & 4 Will. 4. c. 98.

In this suit, a case was sent by the Master of the Rolls for the opinion of the Judges of the Court of Common Pleas. It was argued before them in Hilary term, 1837, and will be found reported in 6 *Law J. Rep.* (N.S.) C.P. 158, and also in 3 *Bing. N.C.* 589.

The case was as follows:—

The London and Westminster Bank is a co-partnership consisting of more than six persons, united in covenants, carrying on in London all such parts of the business of banking as are usually carried on by London private bankers. Mr. George Alfred Muskett is a proprietor of shares in the said London and Westminster Bank, and became such by a purchase of shares from a former shareholder. Mr. George Alfred Muskett carries on business as a banker at St. Albans, which is a town

within sixty-five miles of London, in the county of Hertford, on his own sole account, and is registered at the Stamp Office as the sole person interested in such bank, under the style and firm of the Bank of St. Albans. The said George Alfred Muskett keeps a banking account with the London and Westminster Bank, and the London and Westminster Bank act as the London agents of the said George Alfred Muskett, and receive and collect for him his London monies, and place the same when received to his credit, and hold the same at his disposal, as London bankers usually do for their customers. The Bank of St. Albans has not any connexion whatever with the London and Westminster Bank, except that the London and Westminster Bank act as the London agents of the St. Albans Bank. On the 21st of February 1835, one W. J. Robertson applied at the office of the said Bank of St. Albans, for a bill of exchange on London, for 25*l.*, and paid Henry Edwards, the clerk of the said George Alfred Muskett, the sum of 25*l.* for the same; and thereupon the said George Alfred Muskett, by the said Henry Edwards, his clerk, drew upon the said London and Westminster Bank a bill of exchange, and delivered the same to the said W. J. Robertson.

The following is a copy of the said bill:

"No. 383. Bank of St. Albans post bill, 21st of February 1835. To the London and Westminster Bank, Throgmorton-street. Twenty-one days after date, pay to the order of W. J. Robertson, Esq., the sum of 25*l.*, and place the same to account.

"For the Bank of St. Albans.

"25*l.*

"Henry Edwards."

"Entered, H. E."

The said sum of 25*l.* was received by the said George Alfred Muskett, on his own sole account, and for his own use and advantage.

The London and Westminster Bank did not pay or compound for the stamp duty on such bill, but the stamp duty on such bill was paid or compounded for by the said George Alfred Muskett.

The said bill was, on the 23rd of February 1835, presented to the said London and Westminster Bank for acceptance, and the same was accepted by order of the directors thereof, as follows:—

"Accepted,

"At 38, Throgmorton-street, per. procuration of the trustees of the London and Westminster Bank. J. W. Gilbert,

"Manager."

At the date of the presentment of the said bill for acceptance, the said London and Westminster Bank had, as such London bankers of the said George Alfred Muskett as aforesaid, monies in their hands belonging to the said George Alfred Muskett, to an amount exceeding 25*l.*, and the said bill was accepted for and on account of the said London and Westminster Bank.

The question for the opinion of the Court was, whether the said acceptance, by the said London and Westminster Bank, of the said bill, was lawful; having regard to the provisions of the act, 3 & 4 Will. 4. c. 98, and other acts passed and now in force, respecting the Bank of England.

The certificate returned by the Court was as follows:—

"We have heard this case argued by counsel, and are of opinion, that the acceptance by the London and Westminster Bank, of the bill mentioned in the case, was not lawful, regard being had to the provisions of the act, 3 & 4 Will. 4. c. 98, and the other acts passed and now in force, respecting the Bank of England."

Upon the return of this certificate, the plaintiffs again applied for an injunction.

The MASTER OF THE ROLLS, after referring to the facts of the case, and stating that he concurred in the opinion given by the Court of Common Pleas, granted an injunction restraining the defendants, their agents, clerks, and servants, acting for or on behalf of the company or partnership called the London and Westminster Bank, in the course of their trade or business as bankers, from accepting, or causing to be accepted, any bills or bill of exchange, payable on demand, or at any time less than six months from the time of the acceptance thereof.

Against this decision, the defendants presented a petition of appeal to the House of Lords. The appeal was, however, afterwards abandoned.

V.C.

Aug. 4. }

COCHRANE v. ROBINSON.

Practice.—Decree—Real Estate, Administration of.

There can be no partial administration of real estate in the Court of Chancery.

In the case of an executor, in default for non-payment of a large balance found due from him to the estate of his testator, the decree against his estate on a bill of revivor and supplement to the original suit, is for an account of what is due to his creditors generally, with a direction for the usual advertisements, and is not limited to the particular debt due to the original testator's estate, and the payment thereof.

The original bill in this case was filed by the plaintiff Cochrane and others, claiming interests in the real and personal estates of David Niven, deceased, against Ottywell Robinson, Lucy Niven, and Joseph North the younger, the trustees and executors named in the will of David Niven, and prayed the usual accounts against them, and an account of the rents and profits of the testator's real estate. Joseph North the younger having died, the suit was revived against his personal representatives; and on the 24th of November 1835, the causes coming on to be heard, the Vice Chancellor (amongst other things) directed a reference to take an account of the personal estate of the testator, David Niven, come to the hands of the three executors.

By an order, made at the Rolls, dated the 1st of March 1836, a reference was directed to take an account of the testator's real estates, and of the monies arising from the sale thereof, and from the rents and profits thereof, come to the hands of the two defendants, Ottywell Robinson and Lucy Niven, and the hands of Joseph North, during his lifetime; and the Master, by his general report of the 23rd of February 1837 (amongst other things) found that there was due from Ottywell Robinson and Lucy Niven to the estate of the testator, the sum of 2,614*l.* 8*s.* 9*d.* By the decree of the Vice Chancellor, on further directions, dated the 14th of April 1837, the defendants, Ottywell Robinson and Lucy Niven, were ordered to pay into court the said sums of 2,614*l.* 8*s.* 9*d.*

Ottywell Robinson died on the 7th of February 1837, having by his will, dated the 2nd of January 1827, bequeathed all his estate and effects to his wife Maria Robinson, and appointed her and William Walker executors. Ottywell Robinson left W. W. Robinson his heir-at-law; his executors renounced probate of his will, and, in October 1837, the defendant, W. W. Robinson, procured letters of administration of Ottywell Robinson's estate and effects to be granted to him. Ottywell Robinson, at the time of his death, was possessed of personal estate, and seised of real estates. A bill of revivor and supplement was filed in February 1838, against W. W. Robinson and Maria Robinson, praying an account of Ottywell Robinson's personal estate, and of the rents and profits of his real estate, which had been possessed by W. W. Robinson, and that the real and personal estates of the said Ottywell Robinson might be applied in a due course of administration, so that the plaintiffs might receive thereout the amount due to the estate of David Niven.

The defendant, W. W. Robinson, by his answer admitted, that Ottywell Robinson died possessed of personal estate, and seised of real estate, but stated, that Ottywell Robinson, at his death, was wholly insolvent. Maria Robinson, by her answer, claimed her dower out of Ottywell Robinson's real estates. The supplemental cause now coming on to be heard on bill and answer, the question was, whether the decree ought to direct an account generally of the executor Ottywell Robinson's estate and debts, and of what was due to the plaintiffs and his other creditors, and of his funeral and testamentary expensae, and direct the usual advertisements to be published; or whether the decree ought to be limited simply to the direction for payment of the debt found to be due to the plaintiffs, out of the personal estate of Ottywell Robinson, and the rents and profits of his real estates.

Mr. Knight Bruce, Mr. Stuart, and Mr. Purvis, for the different parties.

HIS HONOUR was of opinion, that there could be no partial administration of real estate, and that the decree should be a general one in its nature. (*See statute 3*

& 4 Will. 4. c. 104.) The decree, accordingly, as drawn up, directed (amongst other things) a reference to the Master to take an account of all the real estates of Ottywell Robinson, the executor, and of the rents and profits thereof, accrued since his death. An account was also directed of Ottywell Robinson's personal estate, possessed by W. W. Robinson, his administrator, and of what was due to the plaintiffs and the other creditors of Ottywell Robinson, and of his funeral and testamentary expenses; and the Master was directed to compute interest on such of the debts as carried interest, &c., and to state the priorities of such debts, and to cause *advertisements* to be published for the creditors of Ottywell Robinson to come in, &c. And it was ordered, that the personal estate of the said testator should be applied in payment of his funeral and testamentary expenses, and of what should be found due from Ottywell Robinson to the estate of David Niven, and the other creditors of the said Ottywell Robinson, according to their priorities, in a due course of administration; and it was ordered, that the real estates of Ottywell Robinson should be sold (subject or not to the dower of Maria Robinson, the widow, as might be arranged), with the approbation of the Master.

V.C. }
June 15. } CANHAM v. VINCENT.

Practice—Revivor—Executors—Dismissal of Bill.

Where a sole plaintiff dies, a motion on the part of the defendants, that his executors who had proved the will might be ordered to revive the suit within a limited time, or the bill stand dismissed, refused.

The bill had been filed by a sole plaintiff, who died in the month of November 1837, having previously by his will appointed two persons his executors, who proved the same in December 1837. The defendants to the bill, had some time since put in their answer, and the present application by motion was, that the executors might be ordered to revive the suit within a limited time, or the bill stand dismissed.

Mr. Lloyd, for the motion, contended, that as regarded the practice of the Court, the principle was the same, whether a sole plaintiff died or became bankrupt; and stated, that in the case of *Randall v. Mumford* (1), a sole plaintiff became bankrupt, and that it was there held, that it was competent in such a case for the defendant to move, that the assignees should revive the suit within a given time, or the bill stand dismissed: that *Porter v. Cox* (2), *Wheeler v. Malins* (3), and *Wade v. Lowring* (4), were to a similar effect: and that *Bowyer v. Shrapnell* (5), and *Deverell v. Bullock* (6), a recent case, in which *Mr. Willcock* was counsel, were direct authorities in favour of the present motion, being cases of a deceased sole plaintiff. It was further contended, that if such a motion as the present were not sanctioned, great inconvenience and injury might arise to individuals, as well with reference to the doctrine of *lis pendens*, in the case of purchases made after the institution of a suit, and during a long abatement, as with reference to the Statute of Limitations; that in the latter case, a bill might be filed by a sole plaintiff, after a delay on his part, of, perhaps, five years and a half from the date of the happening of the cause of suit; that the sole plaintiff might then die, and his personal representatives delay taking any proceedings to revive for a further period of six years.

Mr. Knight Bruce, for the executors, contended, that the motion was contrary to the practice of the Court, in the case of a bill filed by a sole plaintiff; and that at all events, the motion was unnecessarily early, the plaintiff having died as recently as in the month of November last.

His Honour said, he ought to have some precedent cited to him, in which a similar motion to the present had been granted by the Court, after opposition made to it by the personal representatives of a deceased sole plaintiff; that in the MS. cases named, but not reported, it did not appear that any

opposition was offered to the applications; that although it might be some convenience to the defendants to obtain the order now sought, it might be a greater inconvenience to the executors if the order were made; and that it could not be said, that the defendants had a stronger claim in such a case as the present, than a legatee under a will, who could not file his bill for payment of his legacy until the expiration of twelve months from the testator's decease.

Motion refused.

V.C. }
July 2. } BARDSWELL v. BARDSWELL.

Will — Construction — Implied Trust — Demurrer.

Testator, by will, gives all his estate, real and personal, "to C. B., to his heirs, executors, administrators, and assigns, to and for his and their own use and benefit, well knowing he would discharge the trust testator reposed in him, by remembering his sons W. B. and E. B., and his daughters, M. B., M. H.," &c. :—Held, no implied trust in favour of the testator's other sons and daughters, but that the testator's son, C. B., took the testator's property absolutely and unfettered.

The bill was filed by Edmund Bardswell, claiming an interest under the will of his father, Charles Bardswell, and it prayed a declaration of the rights and interests of the plaintiff, and defendants, the other children of the testator, Charles Bardswell. The testator, at the times of making his will and of his death, was seised of freehold estates, and entitled to considerable personalty; and by his will, dated in May 1826, after directing payment of his debts, he gave, devised, and bequeathed "all his estate and effects, both real and personal, of what nature or kind soever, or where the same might be, unto his son Charles Bardswell, to his heirs, executors, administrators, and assigns, to and for his and their own use and benefit, well knowing he would discharge the trust he reposed in him, by remembering his sons, William and Edmund Bardswell, and his daughters, Martha Bardswell, Mary, the wife of Thomas

(1) 18 Ves. 426.

(2) 5 Mad. 80.

(3) 4 Mad. 171.

(4) 1 Fowl. Exch. Pr. 286.

(5) Vice Chancellor, Sittings after Trinity term, 1834.

(6) Not reported.

Hodgson, Jane Bardswell, Eliza Hodgson, and Maria Waln." The testator appointed Charles Bardswell, his eldest son and heir-at-law, sole executor of his will, and died in June 1829; the will was proved by Charles Bardswell in the following month of July. A general demurrer to the bill, for want of equity, was filed by the defendant, Wm. Bardswell.

Mr. Jacob and Mr. J. Russell, in support of the demurrer, contended, that there was no implied trust in the will in favour of the plaintiff; that it was impossible to say that anything was given to the plaintiff and defendants by the will out of the testator's own property; that the words in the will, "to and for his and their own use and benefit," were sufficient to shew that the bequest to the testator's son Charles, was intended to be unfettered; that the words, "for his own use and benefit," were found in *Wood v. Cox* (1), where it was held, that the obligation was one merely of a moral and honorary character, and that there was no trust constituted thereby. The other cases cited, in support of the demurrer, were—

Sale v. Moore, 1 Sim. 534.

Meredith v. Heneage, 1 Sim. 542.

Benson v. Whittam, 5 Sim. 22.

Hoy v. Master, 6 Sim. 568; s. c. 3 Law J. Rep. (N.S.) Chanc. 134.

Lechmere v. Lavie, 2 Myl. & K. 197.

Mr. Knight Bruce and Mr. Wakefield, in support of the bill, contended, that Charles Bardswell took the whole of the testator's property, subject to a trust in favour of the plaintiff, and his brothers and sisters named in the will; that the word "trust" could only refer to the property, the subject-matter of the will; that the trust was certain in its nature, and the parties intended to take under the will designated: but supposing the bequest to be void for uncertainty, in such a case, the next-of-kin of the testator would become entitled, who were the testator's sons and daughters, of whom the plaintiff was one. It was added, that in none of the cases cited was the word "trust" to be found.

The VICE CHANCELLOR.—This case has been ingeniously argued; and the result

(1) 2 M. & Cr. 690; s. c. 6 Law J. Rep. (N.S.) Chanc. 366.

is, that one part of the case destroys the other. It is first observed, that a trust is created by the will; and then it is argued, that no trust exists. [Here his Honour read the words of the will.] It is clear the first words of the will give the whole property of the testator absolutely to his son Charles, the words being "to and for his and their own use and benefit;" and the words that immediately follow the gift to Charles are, "to his heirs, executors, administrators, and assigns;" the words of the alleged trust are personal only as to Charles Bardswell, and no trust is imposed by the testator on his "heirs, executors, administrators, and assigns." But the trusts might have been such as could only have been executed by the heirs, executors, administrators, and assigns of Charles, as, for example, if Charles had died a few days after the testator's death. The whole of the testator's property is absolutely and emphatically given to the son Charles, and it was left to him to provide for or give anything to his brothers and sisters as he chose. In construing a will, you must look at the particular language used by the testator, in order to determine his meaning; and there would, no doubt, have been in this case a trust constituted for the brothers and sisters of Charles Bardswell, if the testator had specified the parties, and stated out of what particular property the trust was to be executed.

V.C.
July 6.

In re THE TRUST ESTATES OF
THE PARISH OF ST. ANTHO-
LIN, IN THE CITY OF LONDON,
AND in re THE ACT OF PAR-
LIAMENT, 1 WILL. 4. c. 60.

*Act of Parliament, 1 Will. 4. c. 60—
Trustees—Leasehold Charity Estates.*

Leasehold, as well as freehold, charity estates are within the 23rd section of 1 Will. 4. c. 60, where all the trustees are dead; and a direction will be made under that section for the appointment of new trustees; and that a proper person be appointed to convey and assign the estates accordingly.

The petition in this case was presented to the Court for the purpose of obtaining

an order for the appointment of new trustees to act with the petitioners in the management of the trust estates of the parish of St. Antholin, in the city of London, and for the appointment of some person to convey and assign the property to the petitioners and the new trustees when appointed. The petitioners were the trustees for the time being of the trust estates, and had been appointed at the parish vestry meeting by election; and they had continued to act in the management of the trust estates, without getting in the legal estate.

By deed, dated the 19th of June 1754, an assignment was executed to certain persons of the trust estates, belonging to the parish, for the residue of the unexpired terms therein, and a conveyance was, at the same time, duly executed to the same persons of the freehold trust estates of the parish; no assignment or conveyance had been executed of any of the trust estates since that date; but some of the parishioners were, from time to time, elected and appointed at public vestry meetings of the inhabitants of the parish, to administer and manage the trust estates. The parties to whom the trust estates were conveyed and assigned respectively by the deed of the 19th of June 1754, had been long since dead, and it was not known who was the survivor of them, or in whom the legal estate of the trust property was vested. The directors of the Eastern Counties Railway Company had given notice to the petitioners of their intention to take and purchase part of the leasehold property in question, under the power and authority given them by an act of parliament recently passed, to enable them to make and establish a railway; and it was necessary, for the purpose of enabling the petitioners to make an effectual assignment, that the legal estate of the trust property, which was outstanding, should be gotten in, and vested in some person who might assign the leaseholds, and also the legal estate in the freeholds.

After reference had been made to the 8th, 9th, and 23rd sections of the 1 & 2 Will. 4. c. 60, the words of the 23rd section being general, the COURT made the usual order, under the 23rd section, for the Master to

advertise for the real and personal representative of the last surviving trustee, appointed under the deed of the 19th of June 1754; and if he did not come in, or make out his title within the time limited by the act, the Master was directed to appoint new trustees of the freehold and leasehold estates, and also to appoint a proper person to convey and assign the same accordingly.

V.C. } VANDER GUCHT v. DE BLA-
July 10. } QUIERE.

Alimony—Injunction—Investigation of Facts preparatory to Application for Injunction.

Alimony is a different thing from, and not analogous to the wife's separate property—is variable in amount at the discretion of the Judge of the Ecclesiastical Court, and is not chargeable by the wife with payment of her debts.

Before a party makes an application to this Court for its interposition by injunction, he ought to make the strictest investigation into the accuracy of the circumstances stated by him.

The bill in this case was filed on the 15th of December 1837, by the plaintiff against the Hon. William de Blaquiére and Lady Harriet, his wife, and stated (amongst other things) that in the month of September 1811, the two defendants intermarried, and in the year 1814 agreed to separate and live apart from each other; that it was agreed between them, that William de Blaquiére should allow and pay to Harriet de Blaquiére for their joint lives, the annual sum of 300*l.*, for her sole and separate use, maintenance, and support; that in the month of May 1820, by a sentence of the Consistory Court, a sentence of divorce was passed, and it was decreed that Harriet de Blaquiére should receive from William de Blaquiére, and that he should pay to her for her sole and separate use, maintenance, and benefit, the yearly sum of 80*l.*, in addition to the said yearly sum of 300*l.*; that on the 8th of June 1835, the said Harriet de Blaquiére was justly indebted to the plaintiff for goods sold and delivered, and money lent, in the sum of 225*l.*,

which she promised to pay to the plaintiff by and out of her separate income and maintenance, and to charge the same therewith; that, for that purpose, she agreed to accept a bill of exchange drawn by the plaintiff, which was as follows:—"London, June 8, 1835, 225*l*. One month after date, pay to my order, the sum of 225*l*. for value received, to the Hon. Lady Harriet de Blaquiére. Palace, Hampton Court, (signed,) C. Vander Gucht." That the said bill of exchange was accepted by Harriet de Blaquiére, payable at Messrs. Herries & Co., and afterwards, when due, duly presented for payment and dishonoured.

The prayer of the bill was, that a declaration might be made, that the debt due to the plaintiff was a charge on the two yearly sums of 800*l*. and 80*l*., and the arrears thereof, and that the plaintiff might be paid thereout his debt and costs; and that William de Blaquiére might be restrained from paying any monies on account of the said yearly sums to Harriet de Blaquiére, and Harriet de Blaquiére restrained from receiving payment thereof.

On the 12th of February last, the plaintiff on affidavit of the facts above stated, obtained an injunction in the terms of the prayer of the bill against William de Blaquiére and Harriet de Blaquiére, and with liberty for the former to pay the amount due from him into court.

The defendant, Harriet de Blaquiére, by her separate answer filed the 30th of May last, (amongst other things,) denied that either in the year 1814, or at any other time, it was agreed between her and William de Blaquiére, her husband, that he should allow or pay to her the sum of 800*l*., or any other sum, or that any sum was to be paid to her for and during the joint lives of herself and William de Blaquiére, or for any other period either for her sole and separate use, maintenance, and support, or otherwise, or that any articles of settlement or instrument in writing, were or was ever executed by her and her husband, or either of them, for the purpose of securing to her the yearly payment of 800*l*., or any other sum for her separate use; but she stated, that in May 1820, a decree was made in the Consistory and Episcopal Court of London, for a divorce, on her behalf; and by an order dated the

16th of May 1820, the Judge of the court allotted to her for alimony, the sum of 880*l*. per annum, to be paid quarterly; and she insisted that alimony was not in the nature of separate estate, but a provision for the wife's support and maintenance from day to day.

Mr. Jacob and Mr. Lloyd now moved on the behalf of Lady Harriet de Blaquiére, to dissolve the injunction, and contended, that the application for the injunction by the plaintiff, was made under an erroneous impression, that there was in existence a separation deed, giving their client a sum of 300*l*. a year for her separate use; that the only question before the Court was, whether alimony could be attached or charged as separate property, and if so, could it be charged by a bill of exchange? It was contended, that alimony was given for a specific purpose, viz. the daily maintenance of the wife, and to relieve the husband; that it could not be pledged; that the Judge of the Ecclesiastical Court might vary its amount at any time, and that it might altogether cease by the husband's departure from the country; that it was similar in its nature to an allowance by a guardian to his ward; and that in all these respects it differed from separate estate. The cases cited in support of the motion, were—

De Blaquiére v. De Blaquiére, 3 Hagg.

322; s. c. 3 Phill. 258.

Murray v. Barlee, 4 Sim. 82; s. c. 9 Law J. Rep. Chanc. 87.

Hunt v. De Blaquiére, 5 Bing. 550; s. c. 3 M. & P. 108; 7 Law J. Rep. C.P. 198.

Owen's case, Litt. Rep. 78.

Anon. 2 Shower's Cases, 282.

Head v. Head, 3 Atk. 547.

Street v. Street, Turn. & Russ. 322.

Mr. Knight Bruce and Mr. James Parker, contra, contended, that the question before the Court was, whether, where irreparable mischief might ensue to one party, the Court would not observe that there was a question to be tried between the parties, and continue the injunction for the present; that the bill sought payment of a general debt, and the plaintiff had a right to go against the alimony, to compel payment of it, independently of the question as to the validity of the charge

by means of the bill of exchange; that there was no distinction between alimony and separate estate; that a party might have 2,000*l.* a year allowed her for alimony, and annually save, and afterwards dispose of one-half of it as her separate property; that separate maintenance in all the old books, was spoken of in the same sense as separate estate; that, at all events, this Court could treat the arrears due in respect of alimony as a debt, which the Ecclesiastical Courts had no authority to do, although they might reduce the amount of alimony from time to time. The cases cited in opposition to the motion, were—

Boddington v. Woodley, L. C. MS.

Kenge v. Delavall, 1 Vern. 326, cited in *Murray v. Barlee*, 3 M. & K. 225; s. c. 3 Law J. Rep. (N.S.) Chanc. 184.

Chamberlain v. Hewson, 1 Salk. 115.

Hunt v. De Blaquiére, 5 Bing. 560, and the observations of the Judge in that case.

Shaftoe v. Shaftoe, 7 Ves. 171.

Dawson v. Dawson, *ibid.* 173.

Oldham v. Oldham, *ibid.* 410.

Stones v. Cooke, 7 Sim. 22; s. c. 3 Law J. Rep. (N.S.) Chanc. 225 (1).

THE VICE CHANCELLOR.—No authorities have been cited to me, to shew that this Court has ever exercised any jurisdiction with reference to alimony, further than by granting a writ of *ne exeat regno* against a party threatening to quit the country, who

(1) In the case of *Stones v. Cooke*, before Lord Chancellor Lyndhurst, on appeal, his Lordship on the 1st of April 1835, gave judgment in substance as follows; viz. that alimony was the proper and exclusive subject for discussion in the Ecclesiastical Court; that no instance was to be found of a bill like the one before him; that, although during the time of the Commonwealth, bills were filed for alimony, they were filed in consequence of the temporary abolition of the Ecclesiastical Courts; that the simple question in the case before him was, whether, where alimony had been suffered to run in arrear, a bill could be maintained by the executors of a wife against a husband; that it was impossible to look into the cases of *Ne exeat regno*, such as *Shaftoe v. Shaftoe*, 7 Ves. 171, and *Dawson v. Dawson*, 7 Ves. 173, without seeing how very reluctantly the Court had acted in giving relief; that the authorities did not warrant the Court assuming jurisdiction in such a case as the one before it; nor from the circumstance of the Ecclesiastical Court not interfering in the case, could his Lordship undertake to found a jurisdiction in that court. *Ex relations.*

has been ordered by the Ecclesiastical Court to pay alimony to his wife. The interposition of this Court has arisen from the circumstance that the Ecclesiastical Courts cannot compel the husband to give bail. If then, there be no instance to be found where this Court interferes to compel the payment of alimony, except in one particular case, how can it be said that alimony is the same thing as separate estate? If the Court does not interfere, then alimony differs from the separate estate of the wife, for the latter remains the same, whatever be the state of the husband's circumstances, whether his *facultates* be *lapse* or not, or whether he be in or out of the country. In short, there is no analogy between alimony and separate estate, and as regards any savings to be made out of the amount allowed for alimony, the observations at the bar do not apply, where the wife wishes to expend the whole of the amount of her alimony on herself. The plaintiff is not so accurate in his statements as he ought to have been, but he has stated enough to satisfy me, that if he had been at all diligent, he might have ascertained the whole facts of the case.

—[Here His Honour read the statement in the plaintiff's affidavit of the alleged agreement in 1814, on the part of General de Blaquiére, to pay 300*l.* a year to his wife for her separate use and maintenance, and of the sentence in the Ecclesiastical Court in 1820, decreeing General de Blaquiére to pay the yearly sum of 80*l.* for Lady Harriet de Blaquiére's separate use, beyond the 300*l.* a year]. This statement the plaintiff ought to have discovered was incorrect, and he ought to have known that the whole sum of 380*l.* was allowed to Lady Harriet de Blaquiére, as and for alimony, under the sentence of the Ecclesiastical Court. It thus turns out on investigation, that there never existed any such agreement as the plaintiff has stated in his affidavit. The reported case of *De Blaquiére v. De Blaquiére* should moreover have induced the plaintiff to proceed still further, and to inspect the judgment itself of the Ecclesiastical Court, when he would have seen that the gross sum of 380*l.* was given at once as alimony, and that no part of it was separate property. Before the plaintiff proceeded to make the

application to this Court for the injunction, he ought to have had recourse to the records of the court in which the judgment was pronounced, when he would have enabled me, on the application for the injunction, to have examined the judgment of the Court, the result whereof would have been, that I should not have interfered. The Court requires those who make application to it for its interposition, to shew reasonable diligence in the investigation of the facts brought before the Court. Here, there has been a gross mis-statement of the case, and I grant the present application with costs.

V.C. }
Aug. 3. } PEEL v. CATLOW.

Will—Construction—Issue.

The word "issue," in a will, held to mean the children only, and not to include the grandchildren of a deceased legatee.

The object of the bill in this case was, to obtain the decision of the Court, as to the parties entitled to the one-sixth share of the testator's residuary real and personal estate, in which Mary Catlow had a life interest.

The testator, Jonathan Peel, by his will, dated the 14th of May 1824, gave and devised his real and personal estate to certain trustees, in trust to sell the same, and directed the monies to arise from such sale to be divided into six equal parts or shares; and after disposing of three of such sixth parts, the testator bequeathed two other sixth parts as follows:—"And as to one other part thereof, I give and bequeath the same unto and amongst all and every the children of my late sister, Jane Taylor, deceased, equally to be divided amongst them, share and share alike; and if there shall be but one such child, then to such only child, to and for their and his or her own use respectively, the said sixth share or the parts and shares thereof to be paid to such children or child at their, his, or her respective ages of twenty-one years, unless such time or respective times of payment shall happen before the expiration of the said term of four years, in which case the parts or shares of such of them as

shall previously attain the age of twenty-one years, shall become a vested interest in him, her, or them respectively, and shall be paid immediately after the expiration of the said term of four years, and that the interest and proceeds of their respective shares in the meantime shall be paid to them, as the same are received by my said trustees and executors; and in case any such child or children shall die under the age of twenty-one years, leaving issue of his, her, or their body, or respective bodies, living at the time or respective times of his, her, or their decease, the part or share, parts or shares of such of them as shall die under the age of twenty-one years, so leaving issue as aforesaid, shall be paid to the issue of such child or children respectively, as soon after the expiration of the said four years as such issue can respectively give a legal discharge for the same; and if any such child or children shall happen to depart this life under the age of twenty-one years, and shall leave no issue of his, her, or their body or respective bodies, living at the time or respective times of his, her, or their decease, then the part or share of him, her, or them so dying shall go and be paid to the survivors or survivor of them, and the issue of such of the said deceased children as shall have died, so leaving issue as aforesaid, (such issue, nevertheless, to take no greater shares than his, her, or their parent or respective parents would have been entitled to, in case such parent or parents respectively had been living,) at such time or respective times as his, her, or their original share or shares shall become payable, or as soon afterwards as circumstances will admit; and as to one other sixth part or share of the said trust monies, I direct that they, my said trustees and the survivor of them, and the executors and administrators of such survivor, do and shall place out the same at interest on good real security, in the names or name of them, my said trustees, or the survivor of them, and do and shall pay, apply, and dispose of the interest, dividends, and proceeds thereof, unto such person or persons, and for such uses, intents, and purposes, and in such parts, shares, and proportions, manner and form, as my sister Mary Catlow, wife of George Catlow, shall, notwithstanding her

present or any future coverture, and whether she be covert or sole, by any note or writing under her hand, direct or appoint, and in default of such appointment, then into the proper hands of my said sister; and from and after the decease of my said sister, upon trust that they, my said trustees, or the survivor of them, or the executors or administrators of such survivor, do and shall call in the said last-mentioned part or share of the said trust monies, or make sale and dispose of the securities, whereon the same shall be then invested, and do and shall pay and apply the same unto and amongst her issue, and to be payable at the like times, and with the like benefit of survivorship and accruer, and in like manner as is hereinbefore expressed and declared of and concerning the sixth part of the said last-mentioned monies hereinbefore given by me to the children of my said late sister Jane Taylor;" and after disposing of the remaining sixth part of the residue, in manner in the said will mentioned, the testator declared, "that in case his brothers William and Joseph, his said sister Mary Catlow, and his niece Martha Mitchell, or any of them, should depart this life without leaving issue of their respective bodies, living at the time of their respective deaths, or leaving any, the same should respectively depart this life under the age of twenty-one years, and should leave no issue of his, her, or their body or respective bodies, living at the time or respective times of his, her, or their decease, then upon further trust, that his said trustees or the survivor of them, or the executors or administrators of such survivor, should pay, apply, and dispose of the share or shares of him, her, or them so dying, to such person and persons, and in such manner and at such time or times, and in such parts, shares, and proportions as were thereinbefore directed, concerning the surviving shares of the said trust monies, and the interests and proceeds thereof, or as near thereto as the deaths of parties, or other circumstances, would admit."

The testator died in 1824, leaving the plaintiffs the executors and trustees of his will, surviving him, who proved the same. One sixth part of the residue, amounting to the sum of 2,921*l.* 14*s.* 7*d.*, had been set apart, and the interest thereof paid to

the testator's sister, Mary Catlow, until her decease.

At the date of the testator's will, and at the time of his death, Mary Catlow was living, and at that time she had living six children, and she had also had two other children—viz. Sarah and Lydia Catlow, who were both dead at the date of the said testator's will; Lydia Catlow having been married, but not having had any child, and Sarah having also been married to Thomas M'Dougall, and having left one child, Mary M'Dougall, an infant defendant.

Mr. Sutton Sharpe, for the infant defendant, Mary M'Dougall, contended, that on Mary Catlow's decease, the sixth part of the testator's residuary estate, in which she had a life interest, would, under the general words contained in the will, be divisible amongst her issue generally, including Mary M'Dougall, her grandchild; and cited—

Christopherson v. Naylor, 1 Mer. 320.

Wagh v. Waugh, 2 Myl. & K. 41; a.c.

6 Law J. Rep. (n.s.) Chanc. 176, n.

Humphreys v. Howes, 1 Russ. & Myl.

639; s.c. 8 Law J. Rep. Chanc. 165.

Tytherleigh v. Harbin, 6 Sim. 329; s.c.

5 Law J. Rep. (n.s.) Chanc. 15.

Mr. Spencer Follett, for five of the six children of Mary Catlow, living at the time of the death of the testator.

Mr. Reynolds, for the provisional assignee of one of the six children, who had taken the benefit of the Insolvent Act.

Mr. Loftus Lowndes, for the plaintiffs.

His Honour said, the question was, whether, in the clause of reference contained in the will, the word "issue" did not mean children; and he thought it of necessity did, for the testator in that part of the will which related to Jane Taylor's sixth share, clearly intended her children only, as the issue, to take on her decease. His Honour was, therefore, of opinion, that under the clause of reference, the person who sustained the character of the child of a deceased child, could not take, and declared, that such issue only of Mary Catlow took an interest in the sixth part of the testator's residuary estate, who could take in the capacity of children in the first instance, and that the grandchild, Mary M'Dougall, took no interest therein.

M.R. }
May 26. } CALVERT v. SEBBON.

Will—Legacy Duty.

*A testator bequeathed some specific chattels and a sum of 200*l.* to S. M.; and he directed his executors to invest in the funds such a sum as would produce 200*l.* a year, clear of the legacy duty and all other deductions, which annual sum was to be paid to S. M. for her life, and after her decease the principal of the fund was bequeathed to other parties; and the testator directed his executors to pay his debts, &c., and also the legacy duty on the specific and pecuniary legacies, and yearly sum given to S. M. S. M. and the legatees in remainder were all strangers in blood to the testator.*

Held, that the duty payable on the legacies to the legatees in remainder, as well as on the legacy to S. M., was to be paid out of the testator's residuary estate.

Richard Laycock, by his will, dated the 10th of July 1833, bequeathed to Sarah Morris, all his household furniture, &c., and also the sum of 200*l.*, to be paid to her clear of legacy duty, within three calendar months next after his decease; and the testator also directed his executors, within three calendar months after his decease, to invest in the funds in their names, such a sum as, when invested, the interest, dividends, or annual produce thereof would from time to time produce the yearly sum of 200*l.*, clear of the legacy duty and all other deductions; and he directed his trustees to pay the annual income of this trust fund to such persons as Sarah Morris should appoint, and, in default of appointment, to pay it to herself for her separate use during her life; and after her decease, he bequeathed one-third of the trust fund to the petitioners, and the other two-thirds to the children of A. and B. who had not acquired vested interests in the fund. And he directed his trustees, out of the monies which should come to their hands by virtue of his will, to pay his debts, funeral and testamentary expenses, and legacies, and also pay the legacy duty payable upon or in respect of the specific and pecuniary legacies and yearly sum given by his will, and bequeathed to or in trust for the said Sarah Morris.

The testator died in May 1834, and Sarah Morris in October 1836.

Sarah Morris, and the several persons to whom the fund was bequeathed on her death, were strangers in blood to the testator, and their legacies were, therefore, all subject to the duty of 10*l.* per cent. A sufficient amount of stock to meet the annuity had been ordered to be set apart, and a part of it had also been ordered to be transferred to the petitioners; and a question was now raised, whether the duty payable in respect of the bequest to the petitioners, was payable out of the trust fund, or out of the testator's residuary estate.

Mr. Pemberton, for the petitioners, contended, that the legacy duty was to be paid, when the trust fund was invested, out of the residue of the testator's estate; and that on the death of Sarah Morris, the whole of that trust fund was bequeathed to the petitioners, and the other legatees in remainder. He referred to the statute 36 Geo. 3. c. 52. s. 12 & 13 (1).

Mr. Swanston and Mr. James Russell, for the residuary legatee, insisted that the bequests to Sarah Morris were alone exempted from payment of the legacy duty; that the rights of the legatees ought not to be affected by provisions introduced into an act of parliament, merely for the purpose of arranging the mode in which legacy duty should be paid. If the Court approved of

(1) Section 12 enacts, "That the duty payable on a legacy or residue (or part of the residue of any personal estate) given to or for the benefit of, or so that the same shall be enjoyed by different persons in succession, who shall be chargeable with the duties hereby imposed at one and the same rate, shall be charged upon and paid out of the legacy or residue, or part of the residue so given, as in the case of a legacy to one person." And section 13 enacts, "That the duty payable on any legacy or residue, or part of residue, so given to, or so to be enjoyed by different persons in succession, upon whom the duty shall be chargeable at one and the same rate, shall be deducted and paid by the person having or taking the burthen of the execution of the will or testamentary instrument under which the title thereto shall arise, upon payment or other satisfaction or discharge of every or any part of such legacy or residue, or part of residue, to any trustee or trustees, or other person or persons to whom the same shall be payable or paid, in trust or for the benefit of the persons so entitled thereto in succession; and if the same shall not be so paid or satisfied to any such trustee or trustees, then such duty shall be deducted and paid out of the capital of the property so given, upon receipt by any of the persons so entitled in succession of any produce of such capital, or any part thereof, according to the amount of the capital of which such produce shall be so received."

the construction which had been put by the petitioners upon the statute, these legatees would be in a better position, with respect to the legacy duty, in consequence of being strangers in blood to the testator, than they would have been in if they had been related to him.

Mr. Pemberton, in reply.

The MASTER OF THE ROLLS.—The testator directed a sufficient amount of stock to be invested to produce a clear sum of 200*l.* a year. The Court is to accomplish the intention of the testator. It became the duty of his personal representatives to invest out of the residue a clear sum which would produce 200*l.* a year. When that had been done, Sarah Morris was to receive the benefit of that sum for her life; but in order to accomplish that purpose, the representative of the testator had to pay the full amount of the legacy duty, which the testator had expressly directed should be paid out of residuary estate. The question is, when this legacy duty has been so paid, is the residuary legatee entitled to call any part of it back again? I think he is not.

Note.—See *Sanders v. Keddell*, 5 Law J. Rep. (N.S.) Chanc. 29; and *Foster v. Ley*, 5 Law J. Rep. (N.S.) C.P. 17.

M.R. }
June 12. } CARTER v. GOETZ.

Demurrer—Discovery.

A. represented to B, that he had discovered a new and valuable process, by means of which, a certain article could be manufactured on very advantageous terms. An agreement was entered into between A. and B, by which it was agreed that this article should be manufactured on B's premises, under the superintendence of A, who was to communicate his secret to B, and his son. B. filed a bill, alleging that several experiments made by A. had been unsuccessful; that A. had never communicated any secret either to B. or his son; and charged that B. had no secret to disclose, and calling on him to set forth what his secret (if any) consisted in; and praying a declaration that the agreement had been obtained by fraud and misrepresentation, and that it might be ordered to be delivered up to be cancelled. A. put in an an-

swer denying the fraud and misrepresentation, and covering all the parts of the bill except those which called for a disclosure of his secret, to which he demurred:—Held, that such a demurrer could not be sustained.

In this bill, the plaintiff, who was a wax and tallow chandler, alleged that he had been many years engaged in manufacturing stearine from tallow, and other animal substances; but that there was no process by which vegetable oils could be used in this manufacture. That in 1836, the defendant informed the plaintiff that he had discovered a process by which he could manufacture from vegetable oils, stearine of as good a quality as had heretofore been obtained from animal substances. That in December 1836, an agreement was entered into between the plaintiff and the defendant, by which it was agreed, that the defendant should manufacture stearine from vegetable oils on the plaintiff's premises, and the expense of such manufacture, and the quantity to be produced, were minutely specified; and if the plaintiff was not satisfied with the process, he was to be at liberty to determine the agreement by the 1st of February 1837, but if it was not determined at that time, it was to continue for seven years. The process which the defendant had discovered, was to be communicated to the plaintiff and his son, and none of the parties were to divulge it to any other persons. By a memorandum indorsed on this agreement, the defendant was allowed to communicate his secret to two other persons therein named, on paying to the plaintiff one-half the pecuniary consideration he received for his communication. Some specimens of the stearine obtained by the defendant's secret process, were produced by the defendant, and given into the possession of the plaintiff's solicitors. The bill then alleged, that the defendant made several experiments in the manufactory of the plaintiff, but that they had all failed; that he had never communicated any secret either to the plaintiff or his son; and charged that the defendant had not any secret to communicate, and had not discovered any process for the manufacture of stearine, which had not been known before, and called on the defendant to set forth what secret (if any) he had discovered. The bill stated, that the agreement

had not been determined on the 1st of February, because the defendant had been prevented by illness from attending to the manufactory during a great part of the preceding month, and the plaintiff was anxious to give him every opportunity of trying his process. The bill prayed that it might be declared that the agreement had been obtained by the defendant by fraud and misrepresentation, and that it might be delivered up to be cancelled; and that the defendant might be restrained from prosecuting an action which he had brought against the plaintiff in the Exchequer, for breach of the agreement.

The defendant put in a demurrer and answer, answering all such parts of the bill as did not require a disclosure of his alleged secret, but demurring to all such parts as could not be answered without divulging what the secret consisted in.

Mr. Kindersley and *Mr. James Russell*, in support of the demurrer, contended, that the defendant was not bound to answer those interrogatories which would have the effect of making his discovery known to everybody, and thus deprive him of the benefit of his ingenuity. The bill might be held on the hearing to be altogether groundless; and what redress could then be given to the defendant for the injury he would have sustained if he were compelled to answer these questions? Even a representation of a fictitious agreement might enable a man to obtain a discovery of a secret—*Yovatt v. Winyard* (1).

Mr. Pemberton and *Mr. Piggott*, contra. —The only defence in such a case as the present, is a plea; a demurrer cannot be sustained. The bill alleges that the defendant has no secret and asks a discovery. The defendant demurs, thereby admitting that he has no secret, or otherwise assuming that his answer in which he insists he has a secret, must be true, and thus concluding the question merely by his own oath. Nor could the defendant, even in that case, have any such benefit from his answer, as he contends for, as the only purpose for which an answer can be read on the argument of a demurrer, is to enable the Court to see whether the demurrer is overruled by it or not. But indepen-

dently of the form of pleading, the justice of the case requires that these interrogatories should be answered.

Mr. Kindersley, in reply.

THE MASTER OF THE ROLLS [after stating the allegations and the object of the bill].—The defendant has put in a demurrer and answer; he has demurred to so much of the discovery sought by the bill, as would lead to the disclosure of his secret, but he has answered to all the rest of the discovery, and has not demurred to any part of the relief. He insists, that by his agreement with the plaintiff, he is not bound to make the disclosure, but the plaintiff repudiates that agreement, and seeks to set it aside for fraud, on the ground, that the representation made by the defendant, that he had such a secret as he alleged, was untrue. If the only means by which he can prove fraud, is by requiring a disclosure of the secret, I think he is entitled to such a disclosure. The validity of the agreement can only be determined by what is called the secret, and on that question, the oath of the defendant, that there is a secret, cannot be conclusive. There must be a mode of affording relief and finding out what the case really is. If a man makes a discovery, he may, if he pleases, keep it secret; if he chooses to disclose it, he may still have the benefit of it by means of a patent; but he cannot enter into an agreement on the representation that he has a secret, without subjecting himself in case of dispute to an inquiry whether there was such a secret or not. This defence could not be sustained, even if it were brought forward in a proper form. The demurrer and answer have been framed to protect him from discovery; but if the law would so protect him in any case, the defence could not be in this form. The bill states that there was not any secret; the defence insists that there was; but this defence is made, not by way of plea, but by demurrer to part of the bill, and answer to the other part. The defendant demurs to the discovery, without demurring to the relief; he demurs, not to the thing required, but to the means by which it is to be obtained.

Demurrer overruled.

(1) 1 Jac. & Walk. 394.

M.R. }
 July 7. } CRACKLOW v. NORIE.

Will—Power of Appointment—Construction.

A testatrix, after devising real estate to her three sisters for their lives, and the life of the survivor, directed that the surviving sister should divide and devise the estate among such of the testatrix's nieces and other relations, particularly female, as should be unprovided for at the decease of the surviving sister, in such shares as she should think fit. The surviving sister, after reciting this power, directed her executor to sell the estate, and divide the proceeds among her nieces, who should be living at her death, in equal shares. These nieces were, at the death of the surviving sister, the sole next-of-kin of the first testatrix.

Held, that either under the appointment contained in the last will, or as next-of-kin of the first testatrix, the nieces were entitled to the estate in question.

Mary Pennell, by her will, made in 1799, after thereby devising her real estates to her three sisters, Sarah, the wife of Samuel Arnold, Mehetable Carter, and Caroline Carter, for their lives, and the life of the survivor, and after charging her estates with two annuities, which were to commence on the decease of the survivor of the three sisters,—continued as follows:

“I will and direct my surviving sister to divide and devise the same estate, with the appurtenances, unto and amongst such of my nieces and other relations, particularly female, as shall be unprovided for at the time of the decease of such my last surviving sister, in such shares and proportions as she, in the goodness of her heart, shall think fit.”

The testatrix died shortly afterwards. Sarah Arnold survived her two sisters, and by her will, made in 1823, after reciting the preceding extract from the will of Mary Pennell, proceeded in the following language:—

“I now, therefore, in pursuance of such power, direct that my aforesaid estate shall, as soon as conveniently may be after my decease, be, by my executor hereinafter named, sold and absolutely disposed of by public auction, and after the completion

of such sale, and fully discharging all expenses which shall be incurred and expended in and about such sale, I hereby direct my said executor to pay and divide the residue of the money to be produced by such sale, to my nieces who shall be respectively living at my decease, equally share and share alike.”

Sarah Arnold died in 1827, leaving five nieces surviving, who were at that time the sole next-of-kin of Mary Pennell, but there were grand-nephews and grand-nieces of M. Pennell, living at that time. A sixth niece was living at the death of M. Pennell, but died in the lifetime of S. Arnold.

A question having been raised as to the validity of the appointment made by Sarah Arnold, this suit was instituted by three of her nieces against the other two nieces, and the heirs-at-law of Mary Pennell, to have the rights of the parties under the two wills ascertained. One of the nieces received 60*l.* a year under the will of Sarah Arnold, but they were all otherwise unprovided for.

In support of the appointment, it was insisted, that a direction to an executor to sell real estate, and divide the proceeds, was a good execution of a power of appointing that estate—*Kenworthy v. Bate* (1). That the word “relations” in such cases as the present, was held to mean such relations only as would be entitled under the Statute of Distribution in case of intestacy; and besides this, that the words in which the power was given, would authorize Sarah Arnold to make a selection among the class of persons pointed out by the will—

Burleigh v. Pearson, 1 Ves. 281.

1 *Sug. Pow.* 565, et seq.

1 *Roper on Leg.* 92, et seq.

Cole v. Wade, 16 Ves. 27.

On the other side, it was contended that the exercise of the power ought to have extended to other relations besides nieces, and was therefore bad; and, that the description in the will of Mary Pennell, of the persons who were intended by her to be the objects of her bounty, was too vague to have the effect of disinheriting the heir-at-law.

(1) 6 Ves. 793.

Mr. Pemberton, Mr. Treslove, Mr. Tinney, Mr. Skirrow, Mr. Girdlestone, Mr. W. C. L. Keene, and Mr. Lewis, appeared for the different parties.

The MASTER OF THE ROLLS, [after stating the two wills,] said,—That if the will of Sarah Arnold operated as a valid appointment, her five nieces were, of course, entitled to the property in question. But if the power had not been well executed, the question arose, who were then entitled to the estate? The expression in the will, of “relations unprovided for,” was too ambiguous for the Court to take notice of; and the only inquiry the Court would make, was, who were the persons whom the Court was accustomed to regard as being intended by “relations”? namely, who were the next-of-kin? and, as it happened that the five nieces were the sole next-of-kin, they must in one way or other be entitled to the testatrix’s estate.

M.R. } THE MARQUIS OF TITCHFIELD
July 12, 18. } V. HORNCASTLE.

Will—Construction—Gift of Monies and Effects.

A gift, in a will, of “monies and effects,” held, under particular circumstances, sufficient to pass real estates.

William Marson, by his will, dated the 15th of May 1827, after directing his debts to be paid, and giving his household furniture, books, &c., to his brother John Marson, and bequeathing several legacies, and giving to Ruth Chambers an annuity of 10*l.* per annum “during her life, payable half-yearly out of my real and personal estate; but this my executors, hereinafter mentioned, will contrive”—continued as follows:—“All the rest, residue, and remainder of my goods and chattels, personal estate and effects of what nature or kind soever, I give and bequeath to—(trustees), upon trust, that they, my said trustees, do and shall, as conveniently as may be after my decease, take an inventory of all my effects, goods and chattels, of whatsoever nature they may be, but not to dispose of or sell any part of the same, not

even the books, until the death of my brother, then the whole of the effects, &c. to be sold, and the money arising therefrom to be considered as the property of the noble person hereinafter bequeathed to. And further, I will and direct that no part of the real property I have, houses, land, &c., shall be disposed of at my death, and that all monies I have in the funds shall remain undisturbed, except what may be wanting to pay the different legacies by me bequeathed. And I further will, that the monies I have lent on bonds, mortgages, &c., shall be so continued, unless on failure of payment of interest, and if thus called in, or the borrower wishes to pay in the principal and interest, then the money so received by the trustees to be immediately purchased into the 3*l.* per cent. reduced annuities, there to remain till after the demise of my dear brother, save and except what may be wanted to pay the different legacies. . . .

And it is my will and determination that my dear brother shall have the whole of the profits arising from my estate, as rents, interest, dividends, &c., as they arise, for his maintenance (subject nevertheless to the kind and benevolent controul and management of the trustees by me in this will appointed), and to have the entire use of the furniture, &c., in short, everything. . . .

And I further will and direct, that my said trustees, on the demise of my brother, shall stand seised and possessed of such monies and effects, upon trust, to pay the same to the Most Noble the Marquis of Titchfield, for his own and entire use, in gratitude, on my part, for his noble father’s condescension, patronage, and support of me, and with the persuasion that his Lordship inherits the good principles of his noble parent; and I have no relation that I know of entitled to a single sixpence from me; in short, I do not know that I have a relation living, unless Mr. Marson my brother’s widow, and she has plenty from the family; his Lordship will not, therefore, I trust, hesitate in accepting the property remaining after my brother’s decease.”

The testator’s brother, and also Ruth Chambers, having died in his lifetime, he made an alteration in the sentence of the will, which is last mentioned, by striking

out the word "brother's," and wrote over the word "brother's," "William Marson, 1835, W. M." The testator also struck out the name of one of the persons whom he appointed a trustee wherever it occurred in the will, and made an interlineation after the direction to the trustees to stand possessed of his money, &c., to the following effect:—"But if his Lordship should not survive me, then the whole of such monies and effects, &c. to be paid to Mrs. Denison, daughter of the Duke of Portland, who married Mr. Denison, of Ossington, or her Ladyship's heirs. May 1835, W. M." And also another interlineation, "I mean, that the Honourable Marquis of Titchfield shall receive all I die worth after the funeral expenses, &c. are paid; but if his Lordship survives not me, then I bequeath all that I remain worth to Mrs. Denison, daughter to the Duke of Portland, and wife to Mr. Denison, of Ossington. W. M. May 1835." "I wish a copy of this will to be laid before the Marquis of Titchfield as soon as may be after my decease. Wm. M." He also made various other erasures and interlineations in his will, by some of which he struck out some of the legacies given thereby, and gave some other legacies, but all such other erasures and alterations related exclusively to the legacies, and to the names and descriptions of legatees and other persons in the said will named.

The testator died in September 1835, leaving John Birch, one of the defendants, his heir-at-law, and heir according to the custom of the manors in which the testator had copyhold lands.

The will was proved, with the interlineations and erasures, in the Prerogative Courts of Canterbury and York.

The present bill prayed, that the will might be established, and that the plaintiff might be declared to be entitled to the residue of the testator's real and personal estate.

Mr. Pemberton, Mr. Turner, and Mr. Denison, appeared for the plaintiff.

Mr. Barber for the executors; and—

Mr. Kindersley and Mr. Chandless for the heir-at-law.

The following cases were cited:—

Doe d. Chillcott v. White, 1 East, 33.

Doe d. Tofield v. Tofield, 11 East, 246.

Doe d. Andrew v. Lainchbury, 11 East, 290.

Doe d. Wall v. Langlands, 14 East, 370.

Jongsma v. Jongsma, 1 Cox, 362.

Hogan v. Jackson, Cowp. 290.

Wilce v. Wilce, 7 Bing. 664; s. c. 5 M. & P. 682; 9 Law J. Rep. C.P. 197.

Doe d. Penwarden v. Gilbert, 3 Brod. & Bing. 85; s. c. 6 Moo. 268.

Doe d. Hick v. Dring, 2 Mau. & S. 448.

THE MASTER OF THE ROLLS.—There is certainly sufficient ambiguity in the language of this will, but I think the Court may still be able to make out the testator's intention.

The rule in the interpretation of wills is, that we must not look at distinct parts, but at the whole instrument, which will enable us to collect the intention of the testator. The heir-at-law of a testator is not to be disappointed unless you find in the will express words, or collect by necessary implication, that the testator intended the estate to go to somebody else. I think cases have been cited to a greater extent than was necessary. There is often more difficulty in understanding the cases cited, than the will which is before the Court. After all that is done, you must look at the words contained in the instrument itself to come to a proper decision.

This testator appears to have made his own will, and to have been very ignorant of the technical meaning of the words which he used. A great deal might be said as to the meaning of the word "effects." It was understood by Lord Mansfield to be equivalent to property or worldly substance. It has been certainly considered, that its primary interpretation is to be confined to personal estate only, and that unless it is connected with some other words, it will not comprise real estate. I do not mean to express any opinion of my own on that subject. I am not aware that the word "effects" may not be as applicable to real estate as to personalty, but I do not think it necessary to give any decision on such a point. Let us consider what appears to have been the meaning and intention of this testator. He intended his brother to have the prior use for his life of such of his property as remained

after paying what debts he might owe, and after the death of his brother, he did not intend any relation of his to have anything. Has he effected that object? First of all he says—[reads the direction for payment of debts]; he subjects all his property to the payment of his debts, then he makes some bequests, and continues, "I give to Ruth Chambers an annuity of 10*l.* per annum during her life, payable half-yearly out of my real and personal estate, but this my executors, hereinafter mentioned, will contrive," that is, they are to contrive to do this out of the real or personal estate, therefore they are to have some estate, which will enable them to do that. He then, after giving some mourning to his servants, proceeds thus:—"And as to all the rest," &c. Then he goes on to direct what was to be done with all that part of his property which produced income. He gives a special direction, that that part of the property which is producing income, shall not be sold, apparently shewing that this was what he intended to be done for the benefit of his brother, that it was in a state in which he wished it to be for the benefit of his brother, and therefore that it should remain so. Then he expressly notices that of which his brother has the income, and which is to be subject to the controul of the trustees. It must therefore be held, that he intended to give all his estate, of what nature or kind soever, to his trustees, for the benefit of his brother for life. Then, on the death of his brother, there is a direction that all shall be converted into money; and then directs that the trustees shall stand seised for the benefit of the Marquis of Titchfield; then he goes on to state, that he has no relations of his own, and says, "I trust, therefore, that his Lordship will not hesitate in accepting the property which may remain after my brother's decease." If it had been merely "the property," it might be said to be the property before mentioned, but he says the property remaining at his brother's decease. It is not necessary to give to that the import of a new devise, but it explains the expressions which were used before. I do think there is sufficient in this will to pass the real estate to the plaintiff.

V.C. } J. SPENCER AND E. WARD v.
Aug. 3, 4, } THE LONDON AND BIRMING-
1836. } HAM RAILWAY COMPANY.*

Injunction—Demurrer—Railway.

Where an injury is done to the public generally by a nuisance, and to persons individually, the latter may maintain a bill, without making the Attorney General a party thereto.

The Court will, in some cases, by means of an injunction in a negative form, compel parties who have begun to take away the rights of others, in some measure to restore them before the hearing of the cause.

The 3 Will. 4. c. 36, and 5 & 6 Will. 4. c. 56, authorized the construction of the above railway; and by the 67th section of the former act, it was provided, that in all cases where in the exercise of the powers thereby granted, any part of any carriage or horse road, either public or private, should be found necessary to be cut through, raised, sunk, taken, or so much injured as to be impassable or inconvenient for passengers or carriages, or the persons entitled to the use thereof, the said company shall, at their own expense, before any such road should be so cut through, raised, sunk, taken, or injured, as aforesaid, cause another good and sufficient road, as the case may require, to be set out and made instead thereof, as convenient for passengers and carriages as the said road so to be cut through, raised, sunk, taken, or injured, as aforesaid, or as near thereto as may be. It appeared that the railway passed under a street leading out of the Hampstead-road, called Granby-street, and by the 55th section of the act, above referred to, the company were required to erect a good and substantial brick bridge over the railway, in such street, so as to leave such street of its present width and uninterrupted.

The plaintiff Ward was the owner of a coach-house and stables situate in Granby Mews, for all the residue of a term of ninety-seven years; and the other plaintiff, Spencer, a stable-keeper, held these pre-

* This, and some of the following cases, properly belong to the Reports of preceding years, but were unavoidably omitted.

mises of Ward, as his tenant from year to year.

The bill stated, that in April 1886, the London and Birmingham Railway Company began to construct their railroad under Granby-street, and that about the 1st of June 1886, they completely cut through and across the whole of Granby-street, and entirely stopped up the carriage and horse road through it; and the only means of communication or access left for carriages and horses from Granby-street to the Hampstead-road, was by means of a very circuitous and dangerous unpaved road called Harrington-street.

In consequence of the inconvenience and injury stated by the bill to have been sustained by the plaintiff Spencer, from the want of proper communication between his mews and the high road, this bill was filed by him and his landlord, which, after stating the above circumstances, stated, that in consequence of the direct communication between the Hampstead-road and Granby Mews being stopped up, the plaintiff John Spencer had lost nearly the whole of his said business. The bill also stated, that the defendants began to cut through Granby-street aforesaid, without any previous notice or warning of their intention so to do, and that the plaintiff John Spencer's servants, on returning home at night, being unaware of the said operation, and there being no fence or lantern set up by the said company, his coach and horses were overturned in the said cutting, and very considerably injured, so as that the plaintiff John Spencer had been obliged to lay out and expend considerable sums of money in repairing the damage thereby occasioned to him and his said coach and horses. The bill prayed a declaration, that the defendants were bound, before the said horse and carriage road was cut through, to have caused another good and sufficient road to be made instead thereof, as convenient for passengers and carriages as the said road so cut through, or as near thereto as might be, or were bound to have left one-half or other sufficient proportion of the said road not cut through, so as that the whole of the said horse and carriage road along the said street, should not be stopped up at the same time; and that they were bound to make good the loss

sustained by the plaintiffs, and especially by the plaintiff John Spencer, by their neglecting so to do; and that the said London and Birmingham Railway Company might be decreed to make a proper road or communication for horses and carriages, and passengers, along Granby-street, so as that convenient access through the said street, for horses, carriages, and passengers into the Hampstead-road, might be made or left; and that an account might be taken, under the direction of the Court, of all sums of money which the plaintiff John Spencer had been obliged to lay out and expend, by reason of the said street having been cut through, as aforesaid, and of all loss and damages sustained by the plaintiffs, by reason of the cutting through and stopping up of the said horse and carriage road, and that the defendants might be decreed to pay to the plaintiffs the amount which should be found due to them respectively, on taking the said account; and also might be decreed to pay the plaintiffs their full costs of this suit, and in the meantime, that the London and Birmingham Railway Company, their servants, and agents, might be restrained by the order and injunction of this Court, from cutting through or injuring, and from continuing to cut through, stop up, and injure the said horse and carriage road leading through Granby-street aforesaid, to the Hampstead-road.

To this bill, the defendants demurred, "because the said bill did not contain sufficient matter of equity, whereupon the Court could ground any decree in favour of the said plaintiffs against the defendants."

Mr. Wigram and Mr. Booth, in support of the demurrer, objected, that the suit ought to have been by an information at the suit of the Attorney General, or, at least, he ought to have been a party defendant: they contended, that there had been no infringement of a private right, but (if any) a public injury, which was the subject of an indictment at law, or an information at the suit of the Attorney General. In *Baines v. Baker* (1), Lord Hardwicke, on a motion being made for an injunction to restrain the building of a small-pox hospital, drew the distinction between a public and a pri-

(1) Ambl. 158.

vate nuisance: "nuisance *ad vicinetum*," said his Lordship, "is a public nuisance. Bills of this sort are founded on being a nuisance at common law. If a public nuisance, it should be an information in the name of the Attorney General; and then it would be for his consideration, whether he would file such an information or not; and that was the case for stopping a way behind the Exchange in the city." Lord Redesdale, in his *Treatise*, p. 144, takes the same view: he says, "Upon the same principle, (to restrain litigation,) the courts of equity seem to have interfered in cases as well of private as public nuisance; in the first, at the suit of the party injured; in the second, at the suit of the Attorney General." That, if such were not the law of the Court, then every individual in the kingdom might file a separate bill for the same object, where a public injury had been committed. That as far as the bill sought compensation, the proper remedy was by an action at law; besides which, one of the plaintiffs had no interest in the damages to the coach, &c., and this portion of the bill was demurrable for the misjoinder of the plaintiffs.

Mr. Knight, Mr. Jacob, and Mr. Stuart, *contra*, contended, that the demurrer to the whole bill could not be supported, as the plaintiffs were clearly entitled to some part of the relief asked by the bill. That the act of parliament formed a contract between the company and the public, which the former were bound most strictly to perform—*Blakemore v. Glamorganshire Canal Company* (2), and that they had no right to touch the old road, until a convenient temporary road had been made; and, to compel this, and to this extent at least, the plaintiffs would be entitled to a decree. That even if this were a public nuisance, and the Attorney General were entitled to come here by information, yet this was a privilege of the Attorney General, and not a restriction of the rights of the individuals who had been injured; otherwise a party might be without remedy, if the Attorney General refused to file such an information. In the case of *The City of London v. Bolt* (3), an injunction was granted to restrain

an admitted public nuisance, at the suit, not of the Attorney General, but of the corporation of London. In this case, an injury had been done to an individual, for which, if he had been the only sufferer, he was clearly entitled to relief in this court. Could this right be destroyed because the public also suffered?—*Duke of Grafton v. Hilliard* (4).

THE VICE CHANCELLOR.—The question is, whether, independently of acquiescence, the bill is not so framed that some relief can be granted. In equity, the species of injunction which Lord Eldon in some instances has granted, in restraining persons from allowing a thing to continue, which had the effect of making them take some active measures, has been recognized by the Court; and I do not see why, if that species of injunction is ever granted, it should not be granted in the present case, and why it should not be to prevent the company from continuing the excavation, and making it greater. The latter part of the injunction, restraining the widening, is quite of the common sort; but, so far as it seeks to prevent them from permitting it to remain as it is, it is of the negative kind: but, still it was adopted by Lord Eldon in some cases (5). There has been done to the inhabitants of Granby Mews a different injury from that which has been done to His Majesty's other subjects. If the cutting were very much widened, all egress would be stopped. If the inhabitants of Granby Mews generally, have access to the road only by means of this street, and some person were to build a wall across the neck of this narrow isthmus, which enables them to get into the wider world, the inhabitants would have quite a different interest from the rest of the world, and might bring a bill. The question is, whether there has not been some species of mischief done or intended to be done in respect of which the inhabitants of Granby-street have a right to file a bill. I cannot but think, that they have; and one thing appears pretty plain, that if instead of filing a bill, Mr. Spencer had brought

(4) Cited by Lord Eldon in 18 Ves. 219; *a.c.* Blunt's *Ambl.* 159, note.

(5) See 10 Ves. 193; 4 Sim. 16; 4 Law J. Rep. (N.S.) Chauc. 18; and 1 Myl. & K. 154, 453.

(2) 1 Myl. & K. 162; *a.c.* 2 Law J. Rep. (N.S.) Chanc. 95.

(3) 5 Ves. 128.

an action on the case, he might have recovered for consequential damages. Those inhabitants who are interested in the tenements of Granby Mews, have a special right to a bill against the company, independently of the public right.

Demurrer overruled.

Aug. 4.—The demurrer being overruled, the plaintiff now moved for an injunction: the allegations of the bill were supported by affidavit.

Mr. Knight, Mr. Jacob, and Mr. Stuart, in support of the motion.

Mr. Wigram and Mr. Booth, contra.

The defence set up by the defendants was, that it was impracticable to construct the tunnel under Granby-street, so as to leave open one-half, or any other proportion of the said street as a thoroughfare for carriages and horses, because, in consequence of there being only a depth of three feet between the crown of the arch of the proposed tunnel, and the surface of the street, it had been found necessary to construct the roof of the tunnel with cast-iron beams, and the railway crossing the street diagonally, it was impossible to lay such beams, unless the whole width of the street was cut through at the same time. That it would not have been possible before cutting through or stopping Granby-street, to have set out and laid, instead thereof, another good and sufficient road, with a direct access for horses and carriages into the Hampstead-road, as convenient to passengers and carriages as the road through the street so cut through, unless all the houses on the south side of Granby-street had been pulled down and removed: the affidavits went on to explain the difficulty which existed in making a temporary bridge, and that the tunnel must be completed almost as soon as a new temporary bridge; and that any interruption in the excavation at Granby-street at the present time, would be attended with great danger to the adjoining houses, in consequence of the insecure state of the soil through which the excavation was then being made, it being necessary to prop up every part as the workmen proceeded; and the delay of a few hours might have the effect of occasioning a slip of the earth into the cutting, and probably destroy some of

the adjoining buildings; and if continued for many days, would certainly destroy those portions of the side walls of the tunnel, which were then in progress. It was also attempted to make out a case of acquiescence on the part of one of the plaintiffs; and it was objected, that this Court never interfered by injunction to compel a party to do a positive act, but only to restrain one—*Blakemore v. The Glamorgan-shire Canal Company* (6).

The VICE CHANCELLOR.—It strikes me really that upon the true construction of the 67th section, it does not lie in the mouth of the Birmingham Railway Company to say, that they can neither make a temporary road in the line of Granby-street, nor make a circuitous road; and it seems to me to be quite plain, that the road by Harrington-street to the Hampstead-road, cannot be held to be so convenient as may be; and it is obvious, that if these parties meant to go from the mouth of Granby Mews towards Mornington Crescent, it is impossible to say, that it is as convenient as might be to go round by Harrington-street, and it seems to me the proper substitute would be something of a line in the direction of the line marked A A and B in the map.

[The defendants' counsel stated, that this could not be effected under the acts.]

Then it comes to this, if the act was so constructed, as that there could be no substitution for Granby-street, in its original state, except by making a temporary bridge over the line of the tunnel in the direction of Granby-street, that must be made. Now, the company can never be allowed to say, that they are physically unable to do that, which by their act of parliament is contemplated, and by them was admitted to be physically possible; because, the act of parliament, which is the bargain between the railway company and the public, has by its terms made it incumbent on the company, if they made the tunnel through Granby-street, to make in the first instance a temporary road in the line of Granby-street; since they themselves tell me, they have no power to

(6) And see *Taylor v. Davis*, 4 Law J. Rep. (N.S.) Chanc. 18.

make this circuitous road, (for I was not aware what were the powers given with respect to purchasing adjacent land). I take it therefore, that the company were absolutely bound in the first instance to make that temporary road in the line of Granby-street. Now in point of fact, the company, by their own voluntary act, without attempting to make a temporary road, thought proper to make the excavation in the line of Granby-street. Well, then it is said, that there has been such an acquiescence on the part of Spencer, that prevents him from having any relief; but it is quite plain by the letter of the 24th of June, that notice was given to the company that Spencer would not waive his right to the carriage-road; and then the company in spite of that, chose to go on, and by going on, they have made an excavation entirely across Granby-street; and what is now said, is, that it is extremely difficult to make a temporary road in Granby-street, having regard to the fact, that they have already made part of the tunnel. Now, the answer given to that is this, if according to their construction of the act of parliament, no substituted road could have been originally made by them, but in the direction of Granby-street, they have been the voluntary authors of all the difficulty that now exists, which, after all, is one of expense only; but the question is, whether a large opulent company, such as the present one, is at liberty to commence operations, which completely block up such a passage as existed in Granby-street, without first providing a substitute; and I cannot but think it of great importance, that matters of this kind should be treated by courts of justice according to the strict rule of right between the parties; because, although this may be insignificant if passed over, yet the company will in future have nothing to do, but with the greatest alertness, to effect that which will produce the most irreparable mischief, and then say, you ought not now to interfere with our works. I cannot but myself think, that this would in effect, be closing the courts of justice to complaints made against such a company as this, who in a very few hours may do great mischief, and when it is done, they may say, it has been so done as to prevent their then giving that measure of justice to the parties in-

jured, which they ought to have; and it does appear to me, notwithstanding what my Lord Brougham has said in *Blakemore v. the Glamorganshire Canal Company*, it is competent for this Court, by means of pronouncing an injunction in the negative form, to compel parties, who have begun by violent attempts to take away the rights of others, in some measure to restore them.

The effect will be, that the company will be put to more expense than they otherwise would; but I cannot help that; it is their own voluntary act that has brought this mischief upon them. Therefore it appears to me, that the plaintiffs are at liberty to take an injunction in that form which will restrain the company from using the tunnel as it is, until they have made that temporary road, which by the act of parliament they are bound to make.

[Some discussion here took place as to the form of the injunction, and his Honour proceeded:]

So far as the tunnel has been made, that is quite another point; but it appears to me, the latter part of the injunction will virtually have the effect of compelling the company to make a passable road in the direction of Granby-street.

The defendants appealed from the decision; and after the case had been opened before the Lord Chancellor, it stood over, and was compromised.

M. R.

July 25,
1836.

PEARCE v. VINCENT.

Will—Devise—Construction.

Under a devise (in effect) to A. for life, with remainder to such of the testator's relations as A. should appoint, and in default, to the testator's nearest relation:—Held, that A. being the nearest relation, could take under the ultimate limitation.

This case is reported in 2 *Law J. Rep.* (n.s.) Chanc. 187; s. c. 2 *Law J. Rep.* (n.s.) Exch. 195, where the facts and arguments will be found stated. The question turned upon the construction of the will of Richard Pearce. Sir John Leach sent a case for the opinion of the Court of Ex-

chequer, but being dissatisfied with the certificate, he sent the case for the opinion of the Court of Common Pleas, who decided in conformity with the opinion of the Court of Exchequer (1). The cause now came on upon the certificate of the Court of Common Pleas, which was as follows:—

"This case has been argued before us by counsel, and we have considered the same; and assuming Zachary Pearce, the testator's brother, to have died without issue in the testator's lifetime, we think, that under the circumstances above stated, Thomas Pearce took an estate in fee under the ultimate limitation contained in the will of the testator. In consequence of our answer to the first question, it becomes unnecessary to answer the second."

Mr. Wright and Mr. Rogers, for the plaintiff, argued as before, that Thomas Pearce took a life estate only.

Mr. Pemberton, Mr. Preston, and Mr. Kindersley, contra, argued, that in the events that had happened, he took an estate in fee simple.

Mr. Girdlestone, Mr. Montague, and Mr. Beavan, for other parties.

LORD LANGDALE.—I have no doubt in this case, the point being, what is the intention to be collected from the whole will, consistent with the usual rules of construction? There having been opposite opinions expressed by Sir John Leach and the two courts of common law, I am placed in an embarrassing position to decide between them, but not having any such doubt as to render it necessary to subject the matter to further investigation, I will not delay the decision of the question, which is, whether Thomas Pearce, being the tenant for life, and also filling the character of the person unnamed, to whom the testator has given the estate in certain events, is to be excluded from taking under the description in the other part of the will? There is an express gift to Thomas Pearce for life; and then—[His Lordship read the will].—The words, "living at my decease," are confined to this, to the gift, in default of any person being appointed by deed or will; or being adopted, and not living at the death of Thomas Pearce.

(1) 2 Bing. N.C. 328; s. c. 5 Law J. Rep. (N.S.) C.P. 82.

It is clear that there was a vested interest to the person who should answer the description at the time of the death of the testator, but who might be removed by the adoption or appointment of Thomas Pearce. An interest being given to take effect at the death of the testator, and it happening that Thomas Pearce, the devisee for life, answered that description, does it therefore follow, because he is the same person who takes for life, that he is to be excluded? It is argued, that the restraint on him, as tenant for life, is inconsistent with the intention that he should have the absolute estate; and so it is. The testator could not have it in his contemplation to give the property absolutely to Thomas Pearce, but he meant to give it to some person to be ascertained afterwards. The intention does not apply to Thomas in this case; he did not intend him as tenant for life, to take under the ultimate limitation, but he intended that the person who might answer the particular description should take, and Thomas Pearce happens to be that person. It therefore does appear to me, that, on the true construction of the will, Thomas Pearce, because he answered the description, became entitled to the property under the ultimate limitation.

V.C.
July 8, } PEARSE v. HEWITT.
1835.

Demurrer—Multifariousness—Mortgage—Pleading.

A suit for the redemption of a mortgage, which also prays for the administration of the estate of the party deceased, who was interested in the equity of redemption, is multifarious.

The right of a party interested in the personal estate of a testator, to sue a debtor to the estate in a case of collusion between him and the personal representative, extends as far as is necessary to obtain payment of the debt, and no farther.

This case came before the Court upon demurrer to the whole bill. The statements and allegations were extremely long and complicated; but it is sufficient, for the purpose of explaining the point decided,

to state the result at which the Court arrived, as to the effect of the several statements.

It appeared that Thomas H. Parker, who was seised of certain plantations in Jamaica, had charged them first with a sum of 40,000*l.* for the benefit of his son Henry Parker and others, and which was secured by a term of 500 years, vested in trustees, and afterwards with other sums for the benefit of his second wife, and the children of his second marriage. He executed also to Timperon a charge on the estates, for monies advanced to him by the defendant Timperon, whom, together with his partner Dobeson, he appointed consignees of the produce of the plantations.

Thomas H. Parker died, and his eldest son Henry Parker, being interested in the 40,000*l.* and in the equity of redemption of the estates, afterwards died. The plaintiffs, who were parties claiming under his will, and interested in his real and personal estate, filed this bill against the trustees and executors of the will of Henry Parker, the trustees of the term of 500 years, the trustees, executors, and annuitants under the will of Thomas H. Parker, the widow and children by the second marriage of Thomas H. Parker, and against Timperon and his partner. The bill prayed for an account of all the charges and incumbrances on the estates, and of the principal and interest due thereon, and that their priorities might be ascertained, and for an account of the estates, liable to pay such charges and incumbrances, and the rents, profits, and produce thereof, and by whom such rents, &c. had been received, and which was due in respect thereof, and whether any of such charges and incumbrances had been satisfied, and particularly that an account might be taken of the rents, profits, and produce of the Chesterfield estate, which had been, or ought to have been, received by the trustees of the term of 500 years, and of the balance due from them in respect thereof; and that they might be directed to pay such balance as the Court should direct; and that an account might be taken of the consignments, produce, and profits of the estates, which had been, or might have been, received by the defendants Palmer (one of the trustees and executors of Thomas's will),

Timperon, and Dobeson, and that Timperon might set off the amount thereof against the principal and interest due on his securities; and that the amounts remaining due on the said several charges and incumbrances, including what was due in respect of the 40,000*l.*, might be raised and paid, and that for that purpose the estates might be sold if necessary; and that upon the amount due in respect of the 40,000*l.* and interest being raised, Bullock (who was interested therein as mortgagee of a part thereof) and Timperon might be paid thereout the sums due on their mortgages, affecting the 40,000*l.*; and that the rights and interests of the plaintiffs in the said estates and premises might be ascertained and secured, the plaintiffs offering to redeem such of the charges and incumbrances on the estates, as in the judgment of the Court they ought to redeem; and that such (if any) of the defendants, as in the judgment of the Court ought to redeem the plaintiffs, might redeem them, or be foreclosed; and for a receiver.

It will be observed, that the bill did not, in terms, pray for the administration of the estate of Henry Parker; the Court, however, thought that, upon the fair construction of the whole bill, it must be taken to be a bill which sought a declaration of the rights and interests of the plaintiffs in the real estates, and a general administration of the personal estate of Henry Parker.

The defendant Timperon demurred to this bill for multifariousness.

Mr. Knight and *Mr. Teed*, in support of the demurrer, cited—

Salvidge v. Hyde, Jac. 151.

Mole v. Smith, *ibid.* 490.

Mr. Temple and *Mr. Girdlestone, jun.*, in support of the bill, cited—

Newland v. Champion, 1 Ves. 105.

Alsager v. Rowley, 6 Ves. 748.

Doran v. Simpson, 4 Ves. 651.

The VICE CHANCELLOR.—In this case the question is, whether the bill is or is not multifarious. *Mr. Timperon* stands in the character of mortgagee; and although there is some difficulty in tracing his different interests, yet he holds the character of mortgagee, and from having received

the produce of the estates, he may be considered as a mortgagee in possession.

The bill is filed by devisees and legatees under the will of Henry Parker, who derived his title under Thomas John Parker, who created the incumbrances; and the bill, after stating the will of Henry Parker, and the circumstances regarding the probate of it, and the incumbrances created by Thomas John Parker, then states—[His Honour went through the allegations and the prayer of the bill, from which he drew the following conclusion:]—From these passages it appears to me, that there is sufficient on the face of the bill to shew that it was the intention of the plaintiffs (although the bill has been very cautiously framed), not only that there should be a declaration of the rights and interests of the plaintiffs in the real estates, but also an administration of the personal estate of Henry Parker; for I cannot see why such care should be taken to state the probate, and the situation of the assets, both real and personal, except to give the plaintiffs the benefit of whatever personal estate there might be, in order that Timperon might be paid, what, if anything, might be due to him.

I think that, upon the fair construction of the whole bill, it must be taken to be a bill which seeks a general administration of the personal estate, and a declaration of the rights of the parties, which would be unnecessary for the purpose for which alone a bill can be filed against Timperon, namely, for the redemption of his mortgage; and the question is, whether he has not a right to object to the bill for multifariousness. If he is never to be freed from this suit until the accounts of the personal estate have been taken, he will not be placed in the situation in which he ought to be, because he has a right to have the account of his principal and interest taken at once, and a day fixed either for payment of it or for a foreclosure, and not to await the result of taking the accounts of the personal estate, and other matters in which he is not at all interested.

The case of *Doran v. Simpson* has been referred to, as shewing that a party interested in the personal estate of a testator has a right to sue a debtor to the estate, where there is collusion between him and

the personal representative; but the right to sue extends as far as is necessary to obtain payment of the debt, and no farther.

I remember another case which was much discussed at the time, namely, *Burroughs v. Elton* (1). In that case, a person who was a creditor to J. Weston, filed a bill praying for a receiver, and that the personal estate might be collected and the debts paid; and a decree having been made, he filed a supplemental bill against Elton, stating the appointment of a receiver, and the decree, and certain circumstances to shew that there was an interest available to the payment of the debts, by reason of an agreement that had been entered into between Weston and Elton; the supplemental bill sought to give effect to that agreement, in order that the plaintiff and the other creditors of the testator might have the benefit of it; it was very much discussed in that case, whether a creditor could file such a bill; and Lord Eldon said, "The point as to the judgment creditor, as far as respects the real estate, must be maintained upon this, that the heir will not stir; and if the creditor cannot proceed, the property cannot be amenable to the debts. In that state, generally speaking, a creditor ought to be permitted to sue." That is, he may sue to the extent to which it is necessary that he should sue, for realizing the debt, in order that it may be made available for the payment of what is due to himself and the other creditors of the testator, because the hand which ought to receive the debt, will not be stretched out to receive it.

Those cases, however, differ from the present, for there the sole object was to recover the debt; but this bill not only seeks to redeem Timperon, (to which purpose it ought to have been confined so far as he is concerned,) but relates to a variety of other matters in which he has no interest, and therefore the cases cited have no analogy to the present.

I am of opinion, that this bill is multifarious, because it seeks something to be done with which the mortgagee has no concern; and it would be a grievous hardship upon him, if he were to be kept before the Court until the various objects to

(1) 11 Ves. 29.

which this bill relates had been accomplished.

The demurrer must therefore be allowed, with liberty for the plaintiffs, if they think right, to amend on payment of all the costs.

M.R. } *He Tutcliffe 20 Dec 175.*
 March 12. }
 L.C. } ADAMS v. FISHER.
 June 15. }

Solicitor and Client—Production of Papers—Practice.

A, and other parties entitled to the estate of a testator, executed a power of attorney to B, to collect and manage the estate: B. employed C. as solicitor for that purpose, who received the assets, and paid over the balance to B, after deducting the amount of his bills of costs, which were not taxed. A. filed a bill against A. and B. for an account, and the delivery up of the documents relating to the testator's estate:—Held, that A. was not entitled to the production of documents relating to the testator's estate, admitted by C. to be in his possession.

The admission by a defendant of the possession of documents relating to the matters in the bill mentioned, is not of itself sufficient to entitle the plaintiff to a production, when the defendant denies the right of the plaintiff. The Court will, in such case, judge from the whole answer, whether they ought to be produced.

A document, which is described in the schedule to an answer, does not, consequently, form a part of the answer for the purpose of production.

This bill was originally filed against Mr. Fisher, a solicitor, alone, alleging that the plaintiff being entitled to the residuary estate of John Collinridge, had employed the defendant as his attorney and solicitor to get in and manage the estate of the testator: it stated, that the defendant had received divers monies in the course of such employment, and that he had in his possession title deeds and papers, relating to the testator's affairs; and it prayed for an account of the monies received, and for the delivery up of the documents.

The defendant Fisher, by his answer, admitted the receipt of the assets of the testa-

tor, but denied that he had been employed as the solicitor or attorney of the plaintiff: he stated, that the plaintiff, and other parties interested, had executed a power of attorney, by which they had appointed a Mr. Pinckard, their attorney, to get in the estate of the testator, and to appoint an attorney or substitute under him for that purpose. That Mr. Pinckard had retained the defendant as solicitor in the matters of the estate, and the defendant, having received the assets of the testator to the amount of 672*l.*, had paid over the balance, after deducting 560*l.*, the amount of his bills of costs, to Pinckard, and obtained a receipt from Pinckard for the same, thereby expressly admitting the amount of the balance. He admitted, that the bills of costs had never been taxed, and that he had in his possession divers documents relating to the testator's estate and affairs, and relating to the matters in the bill mentioned, a list of which was set forth in the schedule: he, however, denied the plaintiff's right to call for their production.

On the 4th of December 1835, the plaintiff moved for the production of these documents, but the motion was refused with costs. The plaintiff then amended his bill, and he made the representative of Pinckard (who was dead) defendant thereto, still insisting, that Fisher had been employed as the plaintiff's attorney, and charging various frauds and collusion between Pinckard and Fisher, which, however, were denied by the answer: the amended bill stated as a fact, the execution of the warrant of attorney to Pinckard. The further answer of Fisher denied the alleged fraud, and again insisted, that he was the attorney of Pinckard, and not of the plaintiff, and, consequently, not bound to produce the documents admitted to be in his possession. The representatives of Pinckard admitted the possession of some other papers.

Mr. O. Anderson moved, as against both defendants, for the production for the usual purposes, of the documents in their possession.

Mr. Pemberton and *Mr. Bagshawe*, contra.

The MASTER OF THE ROLLS ordered the production of the documents in the possession of the representatives of Pinckard,

with the exception of one, and he refused the motion as regarded Fisher, with costs.

From this decision, as far as it regarded the documents in the possession of Fisher, the plaintiff appealed.

Mr. O. Anderson, for the appellant.—The objection raised in the court below to the production of the papers, &c., in the possession of *Mr. Fisher*, was this, that there was no privity between him and the plaintiff, and that he had, improperly, been made a party. But, in cases of fraud, a solicitor may be made a party. *Fennick v. Reid* (1) is a sufficient authority for making an attorney a party on the ground of his possession of his client's documents. Lord Eldon, though he considers it not to be the ordinary practice, admits, that "there may be a special case, in which such a proceeding would be necessary, in order that an attorney and his client might not be allowed by collusion to fence off a just demand;" and, in the same case, Lord Eldon considered the admission of the attorney of the possession of the client's papers, was the same as the admission of the client himself; and that, if the client could be called on to produce, the Court would direct the solicitor to produce them. Even assuming then, that Fisher was the solicitor of Pinckard, and not of Adams, he is on this authority bound to produce. But Fisher was, in fact, the solicitor of the plaintiff, for he admits he acted for Pinckard, the mere attorney of the plaintiff, and that he had notice of that fact; he has received the monies of the plaintiff, and retained the greater portion for his bills of costs, which he admits have never been taxed. The plaintiff, who is the principal, is clearly entitled to have these bills taxed, and the balance ascertained, and for this purpose the documents must be produced. It is not necessary to shew that the plaintiff will be ultimately entitled to relief. In *Evans v. Richard* (2), a production was ordered, although the Court had previously decided, that the contract, which was the foundation of the suit, was illegal, and not entitled to the aid of the Court; and so in the *Highwayman's case*, in the Exchequer.

Again, the documents in the schedule "are, by reference, incorporated in the answer, and become part of it"—*Evans v. Richard*. The plaintiff, therefore, is entitled to see the whole of the answer, and, therefore, the whole of the documents. It is quite enough that the defendant admits he has in his possession documents relating to the matters in question: that admission being made, the plaintiff is entitled, as of right, to their production.

[The LORD CHANCELLOR.—How far then do you push that principle? You must surely shew some connexion between the plaintiff and defendant. Suppose a person were to file a bill, claiming to be a legatee or creditor, and the defendant, by his answer, were to deny all ground on which he came before the Court; as if he were to say, you are not a legatee or creditor, but a mere stranger, can it be said, that the plaintiff would be then entitled to see all the title deeds and documents in the defendant's possession, relating to the testator's estate?]

The plaintiff would be entitled to see every document which he could use at the hearing. He would be entitled to every thing which tended to prove his title; and, it is not enough for the defendant by his answer to deny that the documents tend to prove the plaintiff's case: that was done in the case of *Hardman v. Ellames* (3), a decision, it is true, which has been disapproved of by the profession; but in that case, the production was ordered.

Mr. Bagshawe, for Fisher, was not called on to address the Court.

The LORD CHANCELLOR.—If I rightly understand the facts, there can be no doubt in this case. The defendant Fisher, a solicitor, was employed by Pinckard: he may have known, and it is stated he must have known, that Pinckard, in the transaction with regard to the property, which was the subject of the employment of Fisher, was acting under a power of attorney from Adams; I assume the retainer was from Pinckard, who was employed to settle accounts, &c. Adams says, "I am the *cestui que trust*, and I have a right to an account

(1) Mer. 114.

(2) 1 Swanst. 8.

(3) 2 M. & K. 745; s. c. 4 Law J. Rep. (N.S.) Chanc. 181.

of the trust;" and certainly, if Pinckard has paid any sums improperly, Adams will, as of course, be entitled to have back the money so improperly paid. The bill is filed by the *cestui que trust* against the trustee and the solicitor, and claims are made against Fisher, on the allegation, that he has received too much on account of his bills of costs: Fisher, by his answer, denies all connexion with Adams, and says, that he acted for Pinckard, and that he has nothing to do with Adams: he denies all connexion and privity with Adams. The question is, whether in this state of the pleadings, Adams is entitled to call upon Fisher to produce all the documents in his possession, relating to this matter. This led me to ask the counsel for the plaintiff how far he carried the principle, and he restricted it within the proper limit, and admitted, that as to any document not necessary to make out the plaintiff's title, he is not entitled to a production; then what is necessary to make out the plaintiff's title? The production of the bills of costs cannot surely make out the plaintiff's right to have the bills taxed. Two cases were relied on—first, *Unsworth v. Woodcock*: in this case it is obvious the pleading did shew a title to the production. The Vice Chancellor said, "The plaintiff might compel the defendant to set out the contents of the book in his answer;" he assumed that fact, and when he had arrived at that conclusion, it was of course to order the production. The facts of the case are not stated, but if the Vice Chancellor deduced such a conclusion from them, as that which I have stated, the plaintiff was entitled, of course, to the production of the documents. The next case was *Evans v. Richard*, where the sole question in the cause was, the illegality of trading with an alien enemy; there was no question as to the title, for the plaintiff and defendant were partners, and both therefore had an interest in the documents; there was no question as to this; they belonged to both. The legality of the adventure coming before the Court, on a motion to dissolve an injunction, the Court said it was not legal. An order was afterwards made for the production of certain letters and documents referred to in the answer, and the defendant sought to get rid of the order, by stating the

illegality of the adventure; but there being no question as to the interest, Lord Eldon said, the plaintiff might amend his bill, by omitting the allegation, from which the illegality of the contract appeared, and the admission of possession remaining in the answer, would entitle him to the production of the papers. This case cannot therefore avail to establish the proposition now contended for. It is said, there is an authority for making a solicitor a defendant to a suit, because he has documents in his possession; and *Fenwick v. Reid* is cited for that purpose: there the marginal note is, the "attorney submitting to produce title deeds of his client," may be called on to produce them, if the principal himself could have been called upon so to do; and Lord Eldon said he would not say how far the executor of the attorney can insist on the objection to produce, *because he had submitted to produce*. Lord Eldon's observations on the propriety of making solicitors parties, are as guarded as one might expect from Lord Eldon: he says, "This is the first case I recollect in which an attorney has been made a party to such a bill. The practice is certainly quite unusual." He afterwards said, "Generally speaking, and *prima facie*, it is certainly not necessary to make an attorney a party to a bill, seeking a discovery and production of the title deeds, merely because he has them in his custody, because the possession of the attorney is the possession of the client; but cases may arise to render such a proceeding advisable, as if he withholds the deeds in his possession, and will not deliver them to his client on his applying for them. In the present case, it is from the admissions in Reid's answer, that it must be seen whether or not it is right to order the production of these papers by Clavering." The solicitor, therefore, not objecting to the production, and not disputing the plaintiff's title, Lord Eldon said, "I will look if the co-defendant is liable to produce them, and for that purpose I shall consider them in the possession of the party, and not of the attorney." None of these cases, therefore, support the proposition contended for.

As to *Hardman v. Ellames*, I was surprised to hear that it was thought a new decision; it was by no means a new deci-

sion, but rested on former cases. The defendant put his defence on part of a document; the plaintiff was held entitled to see it, because the defendant chose to make it part of his answer, and referred to it as part of his defence; the plaintiff was entitled to see that the written document referred to was not misrepresented.

It is quite a mistake to say, that every document in the schedule is part of the answer; the plaintiff does not ask by his bill, that the defendant may set forth the documents themselves, but only a schedule of them; and the schedule of them is part of the answer. A plaintiff could not object that a party had only set out a schedule of the documents, and for this reason, because the plaintiff had not asked for more; and it does not follow, that because a party sets out a list of documents, he is therefore bound to set forth their contents. When a defendant does all that is required of him, and sets out a schedule, and accompanies it by a statement, shewing that the plaintiff has no interest in the documents, it is a case for the Court to determine, from the whole of the answer, whether there is sufficient title shewn for the production. Here all title is denied: the case as it stands upon the admissions in the answer, I am of opinion, would exclude the plaintiff from a right to institute this suit against Fisher; and I cannot, in such a state of the record, make an order for production. The motion must be

Refused, with costs.

V.C.	}	URCH V. WALKER.
Feb. 10.		
L.C.		
June 4, 9.		

Trustee—Acceptance of Trust.

*A testator bequeathed 1,100*l.* to two trustees upon certain trusts; and he also bequeathed to the same trustees a house held under a bishop's lease, upon trust to pay the rents, &c. to his wife for life, and after her decease, to apply the rents, &c. in the maintenance of Z, till he attained twenty-one, when the trustees were to convey the property to him absolutely. Z. attained twenty-one in the lifetime of the testator's*

*widow, and on her decease a deed was executed by the trustees, which recited the will, and that it had become unnecessary for the trustees to act in the trusts thereof, and that, in fact, they never intermeddled therein; and the trustees then released the property to Z, who, by another deed, gave them a general release:—Held, that the deed executed by the trustees amounted to an acceptance by them of the trusts of the will, and imposed on them the duty of seeing that the trusts of the 1,100*l.* were duly performed.*

John Frankling, by his will, dated in 1818, amongst other bequests, bequeathed to Robert Blackburn and Edward Wood, a sum of 1,100*l.*, upon trust to place the same out at interest, for the benefit of his daughter, Mary Urch, (the plaintiff,) for her life, and after her decease for the benefit of her children: and the testator appointed his wife Ann Frankling, his sole executrix.

The testator also devised the house in which he lived, and which was held under a bishop's lease, to Blackburn and Wood, upon trust for the testator's widow during her life, and after her decease, upon trust to apply the rents, &c. for the maintenance of J. F. Hewett, until he attained twenty-one, when the testator directed his trustees to convey the said premises to Hewett absolutely.

The testator died in 1818, and his will was proved by his widow, who employed Walker, the first-named defendant, as her solicitor and agent, respecting the testator's affairs. No sum of 1,100*l.* was ever invested in pursuance of the direction of the testator's will; and on the plaintiff, Mary Urch, making application occasionally to Blackburn, in consequence of the interest on this sum not being duly paid to her, he replied, that he would see Walker on the subject, and take care that the same was paid to her.

Ann Frankling died in 1820, having appointed Walker and another person her executors, but her will was proved by Walker only.

A commission of bankrupt issued against Walker in 1820, and the present suit was instituted for the purpose of having a sum of 1,100*l.* invested as directed by the first-mentioned will, and asked a declaration,

that Blackburrow might be declared personally liable to make good that sum.

In order to shew that Blackburrow had acted in the trusts of John Frankling's will, so far as to have rendered himself liable for the 1,100*l.*, it was stated, that on the death of Frankling, he assisted in making an inventory of his effects; but the act which was chiefly relied on, was the execution of the following deed:—

By an indenture, bearing date the 18th of May 1822, and made between Blackburrow and Wood, of the one part, and John Frankling Hewett, of the other part, after reciting the bequest in trust for Hewett; and also reciting the death of the testator's widow, and that the said Hewett attained the age of twenty-one years in her lifetime, *whereby it became unnecessary for Blackburrow and Wood to act in the trusts declared by the said will, and, in fact, they never intermeddled therein*, but inasmuch as the legal estate in the said messuage and lands was still outstanding in them, by virtue of the said recited will, they had consented, at the request of Hewett, to convey such estate to him in manner thereafter mentioned,—it was witnessed, that in pursuance and performance of the said agreement, and *of the trusts so reposed in the trustees*, for conveying the said messuage, &c. unto the said Hewett and his heirs as aforesaid, and for the nominal consideration therein mentioned, Blackburrow and Wood did, and each of them did grant and release unto Hewett, all that the said messuage, &c. given and devised unto Blackburrow and Wood, upon trust as aforesaid.

By a deed-poll, also dated in May 1822, Hewett executed to Blackburrow and Wood a general release.

Blackburrow denied by his answer that he had ever acted as trustee.

Upon the cause coming on before the Vice Chancellor, His Honour decided that Blackburrow must be considered to have accepted the trusts of the will; and ordered a reference to the Master to inquire whether Blackburrow might, but for his wilful default or neglect, have received the 1,100*l.* bequeathed for the benefit of the plaintiff and her children.

From this decision, Blackburrow appealed.

Mr. Temple and *Mr. Purvis*, for the appellant, insisted that no acts of his amounted to an acceptance of the trusts of the will: that he had given some assistance and advice to the widow of the testator, as a friend of the family, and that his execution of the deed of 1822 was merely a matter of form, and that deed expressly recited, that he had never intermeddled in the trusts.

Mr. Jacob and *Mr. Girdlestone*, contra, contended, that the deed of 1822 was not executed with a view of disclaiming the trusts, but of acting in pursuance of them; its object was to convey a legal estate, which they were only empowered to convey by having accepted the trusts—*Talbot v. Earl Radnor* (1), *Crewe v. Dicken* (2). In *Niclosen v. Wordsworth* (3), the trustees disclaimed.

June 9.—The LORD CHANCELLOR.—This is an appeal from a decree of the Vice Chancellor's, by which he declared that the defendant, the appellant, had accepted the trusts of the will of John Frankling the testator, and ordered it to be referred to the Master to take accounts of the estate received by the executrix, and then referred it to the Master to inquire, whether the defendant might, but for his wilful default, have received the sum of 1,100*l.* It was argued, that there was no case made against this defendant, and therefore the bill ought to be dismissed, inasmuch as, although he was appointed trustee of the 1,100*l.*, he had never accepted the trusts; that the testator's money was lost by other parties, with whom Blackburrow had no connexion, and therefore he was not liable. There was one piece of evidence on which the plaintiff relied, which was, that Blackburrow had executed a deed with respect to other leasehold property, of which he was appointed trustee under the will. That property was bequeathed to him in trust for a person on attaining twenty-one, and the deed which he executed was an assignment of that leasehold. He and another person, named Wood, were appointed trustees, and the deed contained this recital—[His

(1) 3 Myl. & K. 252.

(2) 4 Ves. 97.

(3) 2 Swanst. 365; and see 4 Jarman's Byth. 70.

Lordship read the recital, which has been already set forth].

The question was, whether the execution of that deed was not in itself an acceptance of the trust. In the first place, it would be a gross deceit on the parties, were it not an acceptance of the trust, because it was to give effect to the bequest. If the trustees never accepted the trust, which is the position assumed by the defendant, they had no legal estate, and had no power to do what they professed to do. There was a case referred to, of *Crewe v. Dicken*; in that case, there being more than one trustee under the will, one party was desirous of throwing off from himself the liability of the trusteeship, and executed a release to the other trustee. It was decided, by Lord Loughborough, that it was an acceptance of the trusts; the deed could only operate upon that construction, because it was an assumption of the interest. In *Nicloson v. Wordsworth*, Lord Eldon comments on that, and questions the soundness of the decision; but the ground on which Lord Eldon gave his decision, leaves the question on the present deed untouched. True it is, that the object of the trustee was not to accept, but to disclaim the trusts; it was an untechnical attempt to get rid of the trusteeship; and it was insisted, that it would be making the merits of the case yield to technical reasoning to say, that such a deed operated as an acceptance of the trusts. The obvious meaning was, "I disclaim the estate, but inasmuch as the law may have thrown it on me against my will, I will give it back to those who are willing to receive it." True, the right and proper form was not adopted for that purpose; the party is not repudiating the interest given him by the will, but is acting under the will, by executing a conveyance to the party who was intended originally to take, not directly, but through the medium of trustees. Is there anything to shew an intention in this deed to repudiate the trust? It recites that the estate was vested in him, and that he, in pursuance of the trusts, executed that deed: so far from repudiating the trusts, he states that the estate is vested in him, and deals with it for the purpose for which it was vested in him by the testator. Then it is said,

that there is a recital that he has not intermeddled therewith; there is no recital that he did not intermeddle therewith, because he did not adopt the trust, but because the trusts determined on the devisee attaining twenty-one before the death of the tenant for life, and it thereby became unnecessary for them to act in the trusts of the will. So far therefore from this instrument shewing an intention of repudiating the trusts, it was acting in accordance with them, and was an assumption of the property vested in them under the will. They are dealing with it as the testator directed them to do. It is to be observed, that in *Nicloson v. Wordsworth* there is no decision on this question. It appears, that from the shape which that bill assumed, it was impossible to give a decision on that point. The bill was filed by a purchaser, contending, that the vendor had no title, because one of the trustees refused to join in a conveyance. The question was, whether the other trustees did or did not take the estate under the will. The object of the parties was to obtain a declaration of the Court, that there was a clear title; the decree, however, was taken by consent, and there was no decision of the Court on the point. I am not called on to give any opinion on that matter, and I leave it as it is. It is perfectly consistent with everything which Lord Eldon says, that the party in this case should be held to have accepted the trusts. I think it is impossible to raise any doubt. I think it is obvious, that the Vice Chancellor did not intend to carry this case any further than the authorities warrant; because he directs—[His Lordship read the Vice Chancellor's order of reference].—The case is certainly not yet ripe for deciding as to the liability of the defendant; but it is ripe for the purpose of deciding that he is, in the character of trustee, affected by the trusts of the will.

There is enough to shew, that this may probably be a case, in which the tenant for life cannot claim against this defendant for any breach of trust; and I do not doubt it was the Vice Chancellor's intention to have all that brought out on the report. I will not alter the substance of the decree or the meaning of it, as pronounced by the

Vice Chancellor: I will merely vary it so far as to direct, that if it shall appear that there were assets of the testator sufficient for the investment of the 1,100*l.*, but that the same are not now forthcoming; the Master shall state what has become thereof, and why the said 1,100*l.* was not invested.

M.R.
July 21; }
Aug. 7. } HEWITT v. LORD DACRE.

Power — Appointment — Husband and Wife — Grandchildren.

An appointment of personalty, in trust for the husband, of an object of a power, who was not himself an object of such power, held a valid appointment; but an appointment to such husband of a share of the fund, after deducting therefrom a debt due from him to the donee of the power, was held valid, except as to the direction to deduct only.

A power to appoint, among children, "subject to such regulations and directions, with regard to the settling the shares, in trust for their separate use, and with, under, and subject to such powers, provisos, conditions, and other restrictions and limitations over (such limitations over being for the benefit of some or one of them,)" does not authorise an appointment to grandchildren.

A widow, having a power of appointing a fund amongst her children, by her will appointed shares to certain of her children for life, with remainder to their children; and in case any of the children died in her lifetime, she gave the share to his or her issue; and in case there should be no issue, the survivors of her own children were to take: — Held, that the appointment to the grandchildren was void; but that the alternative gift over to the surviving children, in case any died in the testatrix's lifetime without issue, was valid.

In this case, by an indenture, bearing date the 3rd of March 1799, certain funds were vested in trustees, upon trust, for Jane Webb, widow, and her assigns for life, and from and immediately after her decease, upon this further trust, that the trustees, should pay and transfer the same funds "unto, between, and amongst Richard

Webb, Elizabeth Webb, and Jane Webb the daughter, Ann Fletcher, Mary Webb, and Fanny Webb, at such time and times, and in such parts, shares, and proportions, and manners, and subject to such regulations and directions, with regard to the settling the shares of the said Elizabeth Webb, Jane Webb the daughter, Ann Fletcher, Mary Webb, and Fanny Webb, or the share of any of them, in trust for their respective separate use, independently of their respective husbands, and with, under, and subject to such powers, provisos, conditions, and other restrictions and limitations over (such limitations over being for the benefit of some or one of them), and with or without power of revocation and new appointment, as the said Jane Webb, the widow, at any time or times, by any deed or deeds, writing or writings, to be by her sealed and delivered in the presence of and to be attested by two or more credible witnesses, or by her last will and testament in writing, or any codicil thereto, to be by her signed and published in the presence of the same number of witnesses, should direct, limit, appoint, or give and bequeath the same; and in default of any such direction, limitation, appointment, or gift or bequest, and as to such part and so much of the said moiety, whereof no such direction, limitation, or appointment should be made as aforesaid, in trust, that the trustees should pay and transfer the same trust funds, or so much thereof, of which no such direction or appointment should be made, unto, between, or amongst the said Richard Webb, Elizabeth Webb, Jane Webb the daughter, Ann Webb, and Fanny Webb, equally to be divided amongst them, share and share alike, as tenants in common, and not as joint tenants.

Before the date of the will of Jane Webb the widow, Jane Webb, her daughter, became the wife of Samuel Roberts, Mary Webb married the plaintiff Charles Hewitt, and Fanny Webb married the defendant John Bradley.

Jane Webb, the widow, by her will, dated the 30th of September 1826, after reciting as follows:—"And whereas, in or before the year 1820, I lent and advanced to my son-in-law Charles Hewitt (meaning thereby the plaintiff, the husband of Mary), the sum of 500*l.*, and he is indebted

three other persons, in equal shares, and also gave 300*l.* to the defendant, William Baldwin, her executor, and then continued as follows:—"I do hereby declare, that the several legacies by me hereinbefore given, or such of them as shall become payable, shall be paid to the said several legatees within twelve calendar months after my decease, free of legacy duty, and without any deduction whatever, and that the said several legacies given to my said sister Betsey (and other legatees) shall carry interest at the rate of 3*l.* per cent. per annum from the time of my decease, until such legacies shall be paid respectively. Provided always, and it is my will, that, in case the said (other legatees), or my sister Betsey, or any or either of them, shall be dead at the time of my decease, or shall not be heard of to be then living, or shall not respectively claim their respective legacies within twelve calendar months next after my decease, then the legacies hereinbefore given to such of the said respective legatees as shall be dead at the time of my decease, *or shall neglect to claim the same within the time aforesaid*, shall sink into and form a part of my residuary personal estate for the benefit of my residuary legatees." And the testatrix then disposed of her residuary estate.

The testatrix died two days afterwards.

The plaintiff was at that time (January 1834) living at Norwich, where she had resided for several years, and where she continued to reside until August 1837, when she returned to Christchurch, and then, for the first time, heard of her sister's death, which had not been communicated to her. She thereupon applied to the executor of her sister's will, for the payment of the legacy of 1,000*l.*, with interest from her sister's death, and also for her share of the produce of the wearing apparel, &c., which had been sold. The executor having paid over all the testatrix's estate to the residuary legatee, declined to pay these sums to the plaintiff, who then instituted this suit against him.

It appeared, from the defendant's answer, that he had endeavoured, by advertisements, and various other means, to trace out whether the defendant was alive, and if so, where she was living, but that he had not been able to hear anything of her.

Mr. Wigram and *Mr. Romilly*, for the plaintiff, contended, that, as the plaintiff had never heard of her sister's death, no neglect could be imputed to her; and that she was consequently still entitled to her legacy.

Mr. Knight Bruce and *Mr. Jacob*, contra, insisted, that the word "neglect" signified nothing more than a failure or omission to do something; and that, as the legatee had failed and omitted to claim her legacy within the time limited by the will, her legacy was forfeited—*Mackinnon v. Sewell* (1).

THE VICE CHANCELLOR.—The testatrix obviously had in mind a speedy putting an end to the duties of her executor by a distribution of her property.—[His Honour stated the will.]—I think, that, in order to entitle these legatees to claim at all, they must be living at the time of the testatrix's death, and make a claim within the time of twelve months after her decease: if they do so, they are entitled; if not, the residuary legatees are entitled. Therefore, it is clear to me, that, in the event which has happened of a legatee having survived the testatrix, but not having made a claim within the proper time, the legacy is void; because, adverting to the language which is used, I must take it, that she meant to put in contradistinction to making a claim, the neglect to make a claim. She has used the expression, "neglect to claim," instead of using the words, "shall not claim." Therefore, the residuary legatees are entitled; and I cannot see how I can separate one-fourth part of the wearing apparel. I admit, that the expression, "to be paid within twelve months," is not very correctly applicable to a bequest of wearing apparel, but here the language is general as to paying within twelve months. What were their respective legacies? Money and share of wearing apparel. Therefore, unless you strain the words which do occur, they must be held to carry over the share of the wearing apparel, as well as the legacy of 1,000*l.*

(1) 5 Sim. 78; s.c. 2 Myl. & K. 202; 3 Law J. Rep. (N.S.) Chanc. 161.

M.R. }
March. } NELTHORPE v. WRIGHT.

1 Will. 4. c. 36. s. 15. rule 1,—*Construction—Serjeant at Arms—Practice.*

The affidavit of the managing clerk of the plaintiff's solicitor, is not a sufficient compliance with the terms of this rule.

It is not sufficient, under this rule, that the affidavit should detail the circumstances, from which due diligence may be inferred; the solicitor must also state his belief that due diligence has been used.

The 1 Will. 4. c. 36. s. 15. rule 1 (1), enacts, That where a writ of attachment shall have issued against a defendant for not answering the bill, and such defendant shall not have been taken thereunder, and the sheriff shall return *non est inventus*, the Court shall, upon motion, without notice, order a serjeant-at-arms, as in the manner theretofore in use; provided, that before such order shall, in any such case, be made, the plaintiff, applying for the same, shall be required to satisfy the Court by the affidavit of the solicitor of the plaintiff, or his town agent, (if the writ of attachment was issued by such town agent,) that due diligence was used, to ascertain the place where such defendant was, at the time of issuing such writ, and in endeavouring to apprehend such defendant under the same; and that the person suing forth such writ verily believed at the time of suing forth the same, that such defendant was in the county into which such writ was issued.

Mr. H. Williams moved for a serjeant-at-arms under the above act: the application was supported by the affidavit of the managing clerk of the plaintiff's solicitor, and the Court having objected thereto, because the act specifically directs, that the affidavit shall be made "by the solicitor of the plaintiff, or his town agent," *Handfield v. Wildes* (2) was relied on, where Lord Brougham "was inclined to think, that an affidavit made by the town agent's managing clerk, he being the person to whom the duty of making such inquiries was generally committed, might, perhaps, be a sufficient compliance with the exigency of the statute."

(1) 8 Law J. Abridg. Stat. 36.

(2) 2 Russ. & Myl. 91.

The MASTER OF THE ROLLS, however, considered the affidavit of the managing clerk insufficient.

A further affidavit was afterwards made by the plaintiff's solicitor, which stated, according to his belief, the facts, from which due diligence to apprehend him, &c. might be inferred, but it did not state positively the solicitor's belief, that due diligence had in fact been used; an objection being raised to the affidavit on that account—

Mr. H. Williams relied on *Wright v. Green* (3), where Lord Brougham considered it immaterial, so long as the facts, from which such a conclusion might be drawn, were stated; but—

The MASTER OF THE ROLLS said, that, in an *ex parte* application, some of the material facts might be omitted altogether; and that to guard against this, the solicitor ought to state his belief of the correctness of the inference, which he desired the Court to draw from the facts which he stated.

The order was afterwards made on a further affidavit being produced.

*Note.—See *Pugh v. Pugh*, 2 Myl. & K. 358.

M.R. }
March 31. } READ v. TREACHER.

Practice.—3 & 4 Will. 4. c. 94. s. 13,—*20th New Order (Dec. 1833.)*

In this case the MASTER OF THE ROLLS held, that an application to amend by striking out the name of a co-plaintiff, was not such an application as ought to be made to the Master under the 3 & 4 Will. 4. c. 94 (4). His Lordship considered, that as such an amendment would alter the defendant's security for costs, it was a case in which the Master had no jurisdiction (5).

(3) 2 Russ. & Myl. 93.

(4) 11 Law J. Abridg. Stat. 192. sect. 13; and see 20th order, 1833.

(5) *Rees v. Edwards*, 1 Keen, 465; s. c. 6 Law J. Rep. (N.S.) Chanc. 151.

V.C. }
 May 30, } LEWIS v. JOHN.
 1835. }

Practice—Contempt—Rescue.

To a writ of attachment for want of answer, the sheriff returned, that he had taken the defendant, but that he had been rescued:—Held, that the next process of contempt was by sending the serjeant-at-arms, and not by sending the messenger.

To a writ of attachment the sheriff returned, that he had taken the party, but that he had been rescued.

Mr. Spurrier now moved for a messenger; but—

The VICE CHANCELLOR said, that a return of rescue was equivalent to *non cepi*; that it would be useless to send a messenger when the body was not there, and that the serjeant-at-arms must go.

Frederick v. David, 1 Vern. 344, and the note, were cited.

M.R. }
 July 9, 11. } NEWENHAM v. PITTAR.

Marriage Settlement—Construction.

By a marriage settlement, certain personal property of the intended wife was assigned to trustees, in trust for the wife for life, and after her death, for the husband for life, and after the death of the survivor, and in default of issue of the marriage, to the right heir or heirs of the wife. The wife died without issue, in the lifetime of her husband, who took out letters of administration to her effects:—Held, that the husband did not acquire as the administrator of his wife, an absolute interest in the settled property.

Whether the parties in whose favour the husband was excluded, were the next-of-kin of his deceased wife, or the parties who answered the description of her right heir or heirs—quære.

By an indenture, bearing date the 13th of May 1830, being the settlement executed previously to the marriage of the plaintiff, Mr. Newenham, and made between the plaintiff of the first part, his in-

tended wife (then Sarah Jane Waring) of the second part, and trustees of the third part; after reciting that the father of S. J. Waring was entitled to certain leasehold pieces of ground, held partly for lives and partly for terms of years, and also to some fee farm rents; and, that S. J. Waring, as one of his co-heiresses at law, was entitled to one-sixth of his property, and that she was also possessed of a sum of 1,500*l.*; and also reciting that it had been agreed that Mr. Newenham should settle a sum of 4,000*l.*, to make a provision for the intended wife, and the children of the marriage, the plaintiff assigned to the trustees a sum of 4,000*l.*, upon trust for the plaintiff, his executors, and administrators, till the marriage, and after the marriage, upon trust to invest it as therein mentioned, and pay the annual income arising therefrom to the plaintiff for life, and after his decease, to his wife for life, and after the decease of the survivor, in case there should be no children of the marriage, (an event which happened,) then the trustees were to pay it as the husband should direct, or otherwise pay it to his executors or administrators. And, "in order to make a further provision for S. J. Waring and the issue, if any, of the said intended marriage," the said S. J. Waring also conveyed and assigned to the trustees, and to their heirs, executors, administrators, and assigns, her sixth part of the pieces of ground before referred to, which were held on lease either for lives or for terms of years, and also conveyed to the trustees, their heirs and assigns, her sixth part of certain freehold chief rents, in trust for S. J. Waring, her heirs, executors, administrators, and assigns, until the marriage, and after the marriage, upon trust to pay the annual income to her, or as she should appoint, for her life, and after her death, to pay them to her husband for life, and after the decease of both of them, in case there should be no children of the marriage, upon trust to convey, assign, and assure the said several messuages, lands, tenements, pieces or parcels of ground and premises to the right heir or heirs of the said S. J. Waring, for ever. And S. J. Waring also assigned to the trustees, the sum of 1,500*l.*, upon trust for her executors and administrators, until the marriage,

and after the marriage, upon the same trusts as are before mentioned, respecting her other property.

The marriage was shortly after solemnized, and Mrs. Newenham died in May 1831, without having had any child, and leaving five sisters her co-heiresses at law, and leaving her sisters and her mother, and also some brothers and sisters of the half blood, her sole next-of-kin. Her husband obtained letters of administration to her effects, and, as her administrator, claimed an absolute interest in certain arrears of the income of the property in settlement to which she was entitled for life, the leasehold and other personal property brought by her into settlement; and he claimed a life interest in all her other property.

This claim being resisted by the other parties, he instituted this present suit against the trustees of the settlement, the mother, brothers, and sisters of his late wife, praying that he might be declared to be absolutely entitled to the leasehold and other personal property of his late wife comprised in the settlement.

Mr. Kindersley and *Mr. Bagshawe*, for the plaintiff.—The limitations, in default of children, to the right heir or heirs of the wife, would have the effect of giving her an absolute interest in the property so limited. The object for which the wife brought this property into settlement, is stated to be "to make a provision for herself and the issue of the marriage;" but, if the construction of the settlement, contended for by the plaintiff, is not admitted, the property will be absolutely taken away from the wife, in case of her having no issue, and given to other parties who may happen to answer the description of her heirs-at-law.

Holloway v. Holloway, 5 Ves. 399.

Mounsey v. Blamire, 4 Russ. 384.

In *Bailey v. Wright* (1), where there was a limitation to the wife's "next-of-kin or personal representative," the husband was excluded, because the expression "next-of-kin," was regarded as explaining the sense in which the words "personal representative," were intended to be used. But, in this case, the property is so limited, that it ought to devolve upon the parties to whom the law allots the property of a

(1) 18 Ves. 49.

deceased person; and the plaintiff, having obtained letters of administration to his wife, has acquired a good legal title to this property.

Mr. Pemberton and *Mr. Tennant*, for the co-heiresses of Mrs. Newenham, contended, that the settlement contained an express limitation to the right heirs of Mrs. Newenham, and that the Court could not alter such a limitation.

Gwynne v. Muddock, 14 Ves. 488.

Evans v. Charles, 1 Ans. 128.

Mr. Temple and *Mr. Foster*, for the next-of-kin of the half blood, contended, that it was intended that the husband should be excluded, but only in favour of the next-of-kin, and cited—

Hawkins v. Hawkins, 7 Sim. 173; s. c. 4 Law J. Rep. (n.s.) Chanc. 9.

Vaux v. Henderson, 1 Jac. & Walk. 388, n.

Bulmer v. Jay, 3 Myl. & K. 197.

Robinson v. Smith, 6 Sim. 47; s. c. 2 Law J. Rep. (n.s.) Chanc. 76.

Mr. Tinney and *Mr. G. Richards*, for other parties.

The MASTER OF THE ROLLS [after stating the recitals and trusts of the settlement].—These then are the trusts of the settlement. It appears, the marriage took place in May 1830, and there was no issue of the marriage; and Mrs. Newenham died in May 1831. It being now ascertained that there can be no issue of the marriage, the rights of the parties may be adjudicated upon.

By this bill, Mr. Newenham claims to be absolutely entitled to the whole of this property, not only that which was originally his, and which in the events which have happened, is limited to his executors and administrators, but also that which was Mrs. Newenham's, and of which a trust was declared for the right heirs or heir of Mrs. Newenham. Is the husband the right heir of his wife? Does he come under that description? I think it is admitted that he does not come under the literal meaning of the term. But it was said, that the right heir might mean such person as should become by law entitled to succeed to the property; that the husband is the personal representative of the wife, and,

therefore, although he is not entitled to this property, without letters of administration, yet he is entitled to it with the aid of these letters. Can that be the meaning of this sentence? The words here cannot be considered as idly or carelessly used in the different parts of this settlement. We find a limitation in trust for the intended wife, "her heirs, executors, administrators, and assigns," until the marriage; and in default of issue, there is a trust for the right heirs or heir of the wife. Having regard to the whole instrument, I cannot doubt that I must attribute to this settlement an intention to exclude the husband. If it had been intended that the husband should have been a trustee for the next-of-kin, very different words would have been used. The words "heirs and heir of the wife" being used, and the husband not coming under these words, and there being nothing in the settlement to alter their meaning, the effect of them is to exclude the husband.

There is still another important question remaining—the question, who is entitled after the husband is excluded: I am not quite so certain that this is the time to decide it. It is not to be enjoyed until after the death of the husband and wife, and the husband is still living.

L.C. { ILLINGWORTH v. NELSON.
 Aug. 4. { SWANN v. NELSON.

The decision in these cases, (see *ante*, p. 163,) was approved of by the Lord Chancellor in the following cases.

M.R. {
 Mar. 29. { COSTERTON v. COSTERTON.
 L.C. { CLARKE v. WENN.
 Aug. 4. }

Debtor and Creditor — Jurisdiction — Master.

After a decree in a creditors' suit, the Court will stop a creditor from proceeding in another suit for the recovery of a demand against the estate of a testator, if the object can be obtained in the first suit; but secus if the creditor would be unable to obtain relief in the first suit.

A suit was instituted against the representatives of a testator, in respect of a breach of trust; and a decree was afterwards made in a creditors' suit, against the same representatives, and an account of the debts, &c. was directed to be taken. The plaintiff in the first suit, established his claim so far as he could in the second suit, and afterwards brought on the first suit for hearing; there then appearing to be a deficiency of assets, he waived further relief, and took the securities on which the trust fund had been improperly invested:—Held, that the plaintiff in the first suit was entitled to his costs of the first suit out of the assets in the second.

Under the usual decree, in a creditors' suit, the Master has no jurisdiction to entertain a claim founded on an alleged breach of trust committed by the testator, by investing the trust funds on improper securities.

These cases, which are noticed *ante*, p. 162, came again before the Court on the 29th of March, the facts being as follows:—

The first suit was instituted on the 4th of December 1834, to make Charles Costerton, and the representatives of James Wenn, deceased, who were trustees of a marriage settlement, responsible for a breach of trust, in respect of the trust monies.

The second was a creditors' suit, instituted on the 30th of December 1834, by the creditors of the same James Wenn, for the usual accounts of his real and personal estate. It came on as a consent cause, on the 1st of May 1835, when the usual accounts were directed to be taken, and amongst them, the Master was directed to take an account of the debts of the testator.

The plaintiffs in the first suit, carried in their claim in the second, and the Master, by his report, in June 1837, certified that a debt of 2,736*l.* was due from James Wenn, deceased, to the trustees of the settlement, being part of certain trust monies received by the testator, and applied to his own use; and he found, that in addition to such sum, the said testator also invested other parts of such trust monies in certain securities, which it was alleged were or might be insufficient, and a suit was then pending in this court, touching such trust funds,

and the alleged misapplication thereof by the said testator.

The plaintiffs afterwards, in March 1838, brought the first suit to a hearing, when they obtained a decree against the estate of the testator James Wenn, for the aforesaid sum of 2,736*l.*, together with costs, "but, inasmuch as the plaintiffs by their counsel waived any account or inquiries in respect of the several other breaches of trust, alleged by the plaintiffs to have been committed by the testator James Wenn, by reason of the smallness of the assets of the said testator, James Wenn, and the costs and expenses which would be incurred in prosecuting such accounts and inquiries," no decree was made by the Court in respect of the other breaches of trust.

The plaintiffs, in the first suit, having presented a petition in both suits, the Master of the Rolls declared the plaintiffs in the first suit entitled to rank as specialty creditors against the assets of the testator, and to receive payment in the second suit; and he directed the costs of the plaintiffs in the first suit, and of all parties to the petition, to be paid out of the funds in the second suit; and he declared the plaintiffs in the first suit entitled to the benefit of the several securities, upon which, it appeared, the remainder of the trust funds was invested.

The plaintiffs in the second suit appealed from this order.

Aug. 4.—*Mr. Tinney* and *Mr. Blunt*, for the appellants, contended, that after the decree had been pronounced in the creditors' suit, the plaintiffs in the first suit were not justified in proceeding therein, especially after they had gone in, in the second suit, and established their claim to the full extent to which they had afterwards established it in the first suit. That the order of the Master of the Rolls was therefore erroneous in giving to the plaintiffs in the first suit, the whole of their costs out of the fund in the second: part of these at least, they contended, ought to be borne by Charles Costerton, the other trustee. The decision in *Illingworth v. Nelson* (1) being stated to the Court,—

The LORD CHANCELLOR said, he had no doubt of the correctness of that decision.

(1) See *ante*, p. 163.

Mr. Wigram and *Mr. Girdlestone*, for the respondents, were not called on to address the Court, but they intimated that this was an appeal for costs only, which could not be supported (2).

The LORD CHANCELLOR. — When this case was opened, it was represented as being a case, where a particular creditor, having instituted a suit for the recovery of a debt against the estate of a testator, had subsequently gone in and proved his claim in a general creditors' suit, which had been afterwards instituted; that he had subsequently proceeded in his own suit, for the recovery of the same identical demand, and that the Master of the Rolls had given the costs of both proceedings, though they were for the same identical purpose. If the facts were so, I should have been much surprised; but they are very different.

The first suit was to enforce a claim in respect of a breach of trust. This was a subject over which the Master had no jurisdiction, and had no power of investigation. So far as the money had come to the hands of the deceased trustee, it constituted a debt due from him, but there were other claims in respect of the investment of the trust funds on improper securities, and in respect of this, the plaintiff had a right to go on with his suit. If the estate of the testator had been solvent, the plaintiff would have had a right to repudiate the securities, and obtain payment of the money improperly invested; but it afterwards appeared that the estate was insolvent, and he then elected to take the securities themselves, and to go in, in the other suit, for the debt.

The case referred to, namely, *Illingworth v. Nelson*, is consistent with the established practice of the court. After a decree in a creditors' suit, the Court stops a creditor from proceeding for the recovery of a demand against the estate in another suit, that is, if the object can be obtained in the first; but a party has an undoubted right to go on with his suit, if the demand be of such a nature, that he would be unable to get relief in the creditors' suit.

Appeal dismissed, with costs.

(2) See 4 Russ. 181; Beames on Costs, 189.

V.C.
May 2.
L.C.
July 26, 28. } MADDEFORD v. AUSTWICK.

Solicitor and Client—Taxation—Costs.

Several bills of costs of a solicitor had been paid by his client, without any taxation having been made, and without their being examined by any other professional adviser on behalf of the client. After the death of the solicitor, a petition was presented, praying that these bills might be referred for taxation:—Held, that the Court had not jurisdiction to make an order, as against the executors of the solicitor, for the taxation of these bills after the solicitor's death.

This was a petition presented by the executors of Mr. Edward Maddeford, the plaintiff. Maddeford had employed A. as his solicitor in this suit, and in other matters from 1821 till 1834. In 1829, A. took B. into partnership with him, but this partnership was dissolved in 1832, when A. formed a partnership with C. In 1834, A. died, and Maddeford, who had continued to employ C. alone, died in 1835.

Between 1823 and 1834, Maddeford had paid several bills to A, and to A. and his partners, to a large amount, none of which bills had been taxed or referred to any other solicitor on Maddeford's behalf.

The petition prayed a reference to the Master to tax all the bills of costs of A. alone, of the two partnerships in which A. was a member, and of C, and offered to pay what, if anything, should be found due from Maddeford's estate; and it prayed, that the executors of A, and that B. and C. might refund, if it should appear that the bills had been overpaid.

The petition was heard before the Vice Chancellor on the 2nd of May.

Mr. K. Bruce in support of the petition.

Mr. Wright, contra, for the executors of A. and for C, cited *Radford v. Tanner* (1), to shew that there was no jurisdiction to tax a solicitor's bill if paid as against his executor, and *Waters v. Taylor* (2),

(1) At the Rolls, unreported.
(2) 2 Myl. & C. 526; s. c. 6 Law J. Rep. (N.S.) Chanc. 20.

and *Horlock v. Smith* (3). He objected that the Statute of Limitations applied to some part of the bills; and submitted, first, that the Court had no jurisdiction to tax the bills; and secondly, that if any order should be made, it should be a special order suited to the peculiar circumstances.

His Honour granted the prayer of the petition.

The executor of A. appealed from this decision.

Mr. Wigram and *Mr. Wright*, for the appellant, contended, that as the plaintiff had paid these different bills, and had acquiesced in them so long, the Court would require a much stronger case than was made out here, to induce it to interfere, even if it had jurisdiction; but, that the Court had not jurisdiction to order a solicitor's bill to be taxed after his death; that the statute only applied to solicitors themselves, and not to their executors. If a sum was found due from a solicitor's estate, the Court could not tell that an executor would have assets in his hands to pay it.

Mr. Temple, in support of the Vice Chancellor's order, contended, that though executors of a solicitor were not expressly mentioned in the statute, yet the object of the statute (4) was to obtain taxation of an improper bill, and looked to the general purposes, more than to the parties on which the order was to be made; that orders for the taxation of solicitor's bills after their death, were constantly made by the Court.

In re Cole, 2 Sim. & Stu. 463; s. c. *nom. Miller v. —*, 4 Law J. Rep. Chanc. 71.

Weston v. Pool, 2 Stra. 1056.

Willasey v. Maskiter, 3 Myl. & K. 293.

Alsop v. Lord Oxford, 1 Myl. & C. 26; s. c. 2 Law J. Rep. (N.S.) Chanc. 174.

Redfearn v. Sowerby, 1 Swanst. 84.

The Court has held that the statute does not compel the representatives of a solicitor to pay the costs of taxation, when the amount which was taxed off has amounted to one-sixth of the bill; but if the power to order the bill to be taxed had not been exercised, the question would never have been raised. If the Court could not give a

(3) 2 Myl. & C. 495; s. c. 6 Law J. Rep. (N.S.) Chanc. 236.

(4) See 2 Geo. 2. c. 23. s. 23.

client a short remedy against the representatives of a solicitor, at all events they must come in as creditors.

The LORD CHANCELLOR held, that if the Court could not enforce the remedy pointed out by the statute against the representatives of a solicitor, it was a strong reason why the Court should not exercise the jurisdiction at all; that the operation of the statute did not extend to the representatives of solicitors; and that he must therefore discharge so much of the Vice Chancellor's order, as directed the taxation of the costs against the executor of A.

L.C.
Nov. 24, 1837. } STOCKEN v. STOCKEN.
July 24, 1838. } *Millon v. Sumner*
22 L.C. 271
Parent and Child—Maintenance—Covenant—Construction.

By settlement on the second marriage of A, his intended wife's father settled estates on himself for life, remainder for the separate use of his daughter for life, remainder for the children of the marriage, and the trustees under the settlement were directed to apply the rents, after the death of the survivor of the tenants for life, in the maintenance and education of the children, during their minorities; and A. covenanted to allow his wife to enjoy the property thereby assigned, and any future or other property which should accrue to her for her separate use; and her father covenanted that all the personal property he should die possessed of, should be settled on his daughter and her children, in the same manner as the property comprised in the settlement, subject to any other dispositions, qualifications, or charges which he might make by his will. The father died, having bequeathed his residuary estate to A, and appointed him his executor. A. took possession of the settled estates, and received the rents; and mixed them with his own monies. Two children were the issue of the marriage, whom A. maintained at his own expense. A. died, having, by his will, given his children benefits in real estates, which, it was alleged, were purchased in part, with the rents of the settled estates.

Held, that A. was a purchaser of the

trust for the maintenance and education of the children, and that his executors were entitled to be allowed in taking the account of the rents due from A, any sums properly expended by him in such education and maintenance; that the covenant by the father of the wife, was a provision against intestacy only; and an inquiry was directed, confined to the way only in which the surplus rents and profits of the settled estates received by A, had been applied and disposed of.

The direction for an inquiry, as to what part of the real estates devised by A. to his children, for their benefit, had been purchased by A. out of the rents of the settled estates, overruled.

This was an appeal from the decision of the Vice Chancellor, which is reported in 4 Sim. 152.

By the settlement on the second marriage of William Stocken with Mary Ann Bettesworth, certain leasehold estates were assigned by John M. Bettesworth, the lady's father, to two trustees, of whom John Simpson was the survivor, subject to the life interests of John Maslin Bettesworth and his wife, upon trust for the separate use of Mrs. Stocken, for her life, and after her decease, upon trust for the children of the marriage, equally, as tenants in common, and to be assigned and transferred to them at their respective ages of twenty-one; and, in case all the children should die under twenty-one, then in trust for W. Stocken, his executors, administrators, and assigns; and the trustees were directed, after the death of the survivor of Mr. and Mrs. Bettesworth and Mrs. Stocken, to apply the rents and profits, at their discretion, for the maintenance and education of the children during their minorities. And William Stocken covenanted that he would permit Mary Ann Bettesworth to enjoy for her separate use, as well the property thereby assigned, as any future or other property which should accrue to her, either from her father or any other person. And J. M. Bettesworth covenanted that all the goods, chattels, and effects which he should die possessed of or entitled to, should, upon his decease, be settled upon M. A. Bettesworth, for her separate use, during her life, and after her decease, for the benefit of all her chil-

dren, equally, in the same manner as the premises thereby assigned were settled for their benefit, "subject only, nevertheless, and without prejudice to any other dispositions, qualifications, or charges which J. M. Bettesworth should or might make, by his last will and testament, of or concerning the same, or any part thereof." In the covenant against incumbrances contained in the settlement, a mortgage for 500*l.*, and a further charge of 100*l.*, created by J. M. Bettesworth, were excepted.

Mr. and Mrs. Bettesworth died in the lifetime of Mrs. Stocken.

Mr. Bettesworth, by his will, after bequeathing a legacy of 100*l.*, gave the residue of his estate and effects, after payment of his debts, legacies, and funeral and testamentary expenses, to William Stocken, and appointed him his executor. Stocken proved the will; and, after paying the testator's debts and the legacy of 100*l.* appropriated the residue to his own use.

Mrs. Stocken died in September 1812, leaving her husband and two infant children, Francis M. Stocken and M. A. Stocken, surviving her. Upon her death, Simpson, the surviving trustee, who did not appear to be then accurately acquainted with the contents of the settlement, inquired of Mr. Stocken, whether it would be necessary for him to take any steps with respect to the leasehold property, the subject of the settlement; and, being answered in the negative, he permitted Mr. Stocken to enter into, and continue in possession of the leasehold premises, till his death. Stocken kept no accounts of the rents which he received, but mixed them with his own monies.

Mr. Stocken died in 1824, leaving his two children, who were still infants, surviving him; and having, by his will, dated the 1st of November 1823, given them considerable benefits, partly in pecuniary legacies, and partly by devises of real estates; and he devised and bequeathed to Oliver Thomas Joseph Stocken, his son and heir by a former marriage, other portions of his real and personal estate, and gave to him all the residue of his estate and effects, and appointed him, together with the other defendants King and Dawson, executors of his will.

Shortly after the death of Mr. Stocken,

Mr. Simpson discovered a copy of the settlement, and having been advised upon its effect, he applied to the executors to have the leasehold property given up to him; and he was, accordingly, let into possession of it.

In June 1826, the bill was filed by Francis Maalin Stocken, Mary Ann Stocken, and Simpson, against the executors of Mr. Stocken, who were also the devisees in trust of the estates devised for the benefit of the infant plaintiffs, praying, among other things, for an account of the rents and profits of the settled estates received by William Stocken, in his life, and after his decease by his executors, and for an account of Bettesworth's residuary estate; and that what should be found due, on the taking of such accounts, might be declared to be a debt due from William Stocken's estate, and to be payable with interest.

The defendants, by their answer, admitted that W. Stocken had received the rents of the leasehold estates, and mixed them with his own monies, and that he had kept no accounts; but they alleged, that he had paid off the mortgage and further charge upon those estates, and laid out a part of the rents in the purchase of a portion of the estates devised to the infant plaintiffs; and that he had maintained and educated them at his own expense; and they claimed to have allowances made to them in respect of the sums so paid and laid out, and also in respect of William Stocken having maintained and educated the infant plaintiffs, although they admitted that he was of ample ability so to do.

The case was originally heard by the Vice Chancellor, on the 21st of January 1831. His Honour's judgment, on that occasion, was as follows:—With respect to the question of maintenance, it is quite clear, that Mr. Stocken, notwithstanding he was of ability to support his children, would have been entitled, under this settlement, to have an adequate portion of the rents applied for their maintenance and education; and therefore, it ought to be now ascertained what sums were proper to be allowed for those purposes; and the defendants must have credit in account for the amount.

Independently of the covenant of Mr.

Stocken having the effect of giving up the after-acquired property of his wife, the case would fall precisely within *Mundy v. Earl Howe*; and I should so have decided it, even if that covenant had been wanting. The consideration of marriage alone, constituted the father a purchaser; and the benefit of the trust was part of his contract. The covenant identifies the two cases completely.

With respect to Mr. Bettesworth's covenant, it had no other effect than to prevent an intestacy. It is quite clear that Mrs. Stocken and her children were to take, in the event only of his making no other disposition.

The monies owing from Mr. Stocken to his children, being in the nature of a debt, the benefits given them by the will are not to be considered as a satisfaction; but there should be an inquiry, to ascertain whether any portion of the property given by the will, was derived from the rents of the leasehold estates.

By the decree, however, as drawn up, the Court declared that William Stocken, deceased, in the pleadings named, was entitled to the rents and profits of the estates comprised in the settlement of the 16th of October 1805, and also to the personal estate of the said John Maslin Bettesworth. And it was ordered that it be referred to the Master in rotation, to inquire whether any portion of the property given to the children of the said William Stocken, was purchased, with the rents and profits of the said settled estates, and for the better discovery &c. Reserving considerations of further directions, &c. With liberty to apply, &c.

From this decree the plaintiffs appealed.

The case was heard on appeal before Lord Brougham, on the 17th of December 1833, but no judgment was delivered.

Mr. Wigram and *Mr. Goodeve*, for the plaintiffs.

Mr. Bethell and *Mr. Wood*, for the respondents.

The cases of—

Mundy v. Earl Howe, 4 Bro. C.C. 223.

Bristow v. Warde, 2 Ves. jun. 336.

Pierpoint v. Cheyney, 1 P. Wms. 488.

Tolson v. Collins, 4 Ves. 483; s. c. 2 Mad. Pr. 57.

Lane v. Dighton, Amb. 413.

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Meacher v. Young, 2 Myl. & K. 490.

Hinchcliffe v. Hinchcliffe, 3 Ves. 516. were cited.

July 24.—The LORD CHANCELLOR.—

The bill in this case had three objects—first, to claim the residue of the estate of the plaintiff's maternal grandfather, under a covenant in the marriage settlement of the plaintiff's mother. The second object was to obtain payment against the estate of the father, of a claim alleged to have arisen and to have existed as a debt, in respect of the income of certain property of the infants, settled upon the marriage of their mother with William Stocken, their father, and which it was alleged the father had received. The third object was to establish the will of the plaintiff's father, and to secure the benefits, which, under that will, the plaintiffs claim to be entitled to.

Now, the decree appears so inconsistent with the judgment pronounced by the Vice Chancellor, that I can hardly understand how it came to be drawn up in this form. The decree merely did this: it declared that William Stocken, the father, was entitled to the rents and profits of the estates comprised in the settlement of the 16th of October 1805; and also to the personal estate of J. M. Bettesworth, the maternal grandfather; and ordered that it should be referred to the Master, to inquire whether any portion of the property given to the children of William Stocken, was purchased with the rents and profits of the settled estates. That was the whole of the decree, so far as related to the rents and profits. It disposed of the case, so far as related to the residue of the estate of Bettesworth, the maternal grandfather, because it declared that William Stocken was entitled to it; but not disposing of the question, which was the question argued before the Vice Chancellor, and upon which his judgment was pronounced, namely, that the father was entitled to an allowance out of the rents and profits of the estate of the children, on account of their maintenance. It declared then, that the father was entitled to the rents and profits of the estate, without limit, without account; and then it directed an inquiry whether any portion of the property given to the children of William Stocken, was purchased with the

rents and profits of the settled estates; a direction inconsistent with the prior declaration, which declared that the father was entitled to the whole. If he was entitled to the rents and profits, it was quite immaterial what he did with them. That inquiry could only be material as to the question of satisfaction. I cannot conceive by what accident the decree was drawn up, so inconsistent with the decree made, and the judgment of the Vice Chancellor, and the pleadings, as appear to be reported in the 4th volume of *Simons's Reports*; and the question now to be considered is, what the proper decree ought to have been.

The first question is, the effect of the covenant of Bettesworth, the maternal grandfather, under which the plaintiffs claim the residue of his personal estate. Now, that covenant is as follows—[His Lordship stated it].

On the part of the plaintiffs, it was contended, that these latter words, "subject only, nevertheless, and without prejudice to any other dispositions, qualifications, or charges, which he should or might make by his last will and testament, of and concerning the same, or any part thereof," only extended to small variations, not altering the real object, the prior disposition, but merely enabling him to make certain variations in the provisions to the children of the marriage. It seems to me to be quite impossible to maintain that proposition; and I think there is no real doubt upon the construction of this covenant, and that all he meant to say was, "If I make no other disposition of it, the property which I shall have, shall go in the same way as the property I have settled." He meant to reserve to himself, as the words necessarily import, the power to give the property in any manner he thought proper by his will. It was a provision in case of an intestacy, or of his not otherwise disposing of the property, and not limiting the power he had reserved, of disposing of his property as he thought proper. It is impossible to read the other words, "any dispositions, qualifications, or charges," without coming to this conclusion. If a man gave to another any property subject to any disposition, charge, or qualification he might make, it would be impossible to say to what limit you could confine such a

power of disposition; it is so ample, and entirely comprehends the power which the testator has exercised over the property. No doubt is left in my mind, that the construction which the Vice Chancellor put upon the proviso, is the right construction, and the children have, therefore, no right, under the covenant, to the residue of the property which Bettesworth left by his will to William Stocken.

The next question concerns the rents of the settled estates, which, after the death of the mother, were received by the father, and, as the plaintiffs contend, as agent, or bailiff, or trustee for them; and the only question upon that part of the case is, whether the father was entitled, out of those rents and profits, to have an allowance made for the maintenance and education of the children. There was an estate for life, and an annuity; and subject to the payment of the annuity, and after the decease of the said Mary Ann Stocken, the property was settled in trust for all the children.—[His Lordship stated the trust for the children.]

Then comes this provision: "but if there should be no children leaving lawful issue, then in trust to assign and transfer the said leasehold premises unto the said W. Stocken, the executors, administrators, and assigns," shewing, therefore, that the authors of that settlement had in contemplation, children to be left by the mother in their minority, and the father surviving, because, he provided for the event of the children all dying under twenty-one, the mother being previously dead, and then the property should go to the father. Then, there is an express trust after the death of the mother, who had an estate for life, that the trustees should apply the income of the property towards the respective maintenance and education of the children, contemplating the father being alive at that time. It is, therefore, part of the contract, which the father entered into on his marriage, that the property coming from the wife, should be applied towards the maintenance and education of the children; it comes, therefore, precisely within the case of *Mundy v. Lord Howe*, which was acted upon in a very recent case of *Meacher v. Young*, before Sir John Leach, when Master of the Rolls.

It is out of the ordinary rule, for the father is bound to maintain his children, even as against property which is their own. It is competent for a father to contract, that the children's property shall be applied for that purpose, and here he has so contracted. It was part of the present contract, that the father, in the event of the death of the mother, should have the benefit of the allowance for the maintenance of his children, the proper allowance being in proportion to the property, and the situation in life in which the children are placed. I have no doubt that the true construction of the provision is, that the father is, as against the debt due from him, that is, the amount of the rents and profits which may be found he has received on account of his children, entitled to be allowed what may appear to be a proper sum in respect of the maintenance and education of the children.

There is nothing to justify the decree of the Vice Chancellor, that the father was entitled to the rents and profits of the estates: the children were entitled; and the father, as against the children, was entitled to a deduction of everything which he had properly expended in their maintenance and education.

The settlement was made, subject to the mortgages, and, therefore, I think that the parties are entitled to an inquiry as to the circumstances under which the mortgages were paid off, if they ask it.

Then, as to the inquiry that was directed by the Vice Chancellor's decree, whether any portion of the property, given to the children of William Stocken, was purchased by William Stocken, the father, with the rents of the plaintiff's property, under the settlement, it does not appear to me that there is any ground for an inquiry in that shape, because the answer states this, that the father, William Stocken, conceiving himself to be entitled to the income, treating the property as his own, kept no separate account, and mixed the rents and profits with his own monies; and if he did so, there can be no following the amount of these rents and profits into the land which he may have purchased. But it appears to me to be right and proper that there should be this inquiry, which is quite consistent with the pleadings, and the claim between the parties; after taking the account of rents and profits received

by the father, and of what the Master may find to be a proper sum allowed for the maintenance and education of the children, let the Master inquire in what way the surplus of those sums was applied and disposed of: this may bring out a fact which may be material between the parties, and it is quite consistent with the whole case made. Clearly there can be no inquiry as to the investment in the purchase of the sums devised by the will. The objection to the inquiry is, if the Master should find it in the affirmative, it would at once lead to the conclusion of the question of satisfaction.

Now, suppose the Master to find out that which is at present uncertain, namely, that there was a surplus income of the property of the children beyond what was properly expended for their maintenance and education, that would constitute a debt against William Stocken's estate; and then the question of satisfaction will arise, the father having by his will made certain provisions for those children. It is at this moment perfectly uncertain whether there will be any debt or not. The amount, also, of what they may take under the father's will, is also uncertain; and the estate has not been administered. It is quite uncertain to what extent the children may be able to obtain payment of that which the father has intended for their benefit. It is obviously impossible, therefore, at this moment, to come to any conclusion with regard to the question of satisfaction, inasmuch as it is uncertain whether there will be any debt to be satisfied; but the question may be raised when it is ascertained what is the amount of debt, and the amount of benefit the children are entitled to under the will; and it is to be observed, that there are no provisions under the will which would operate as between strangers as a satisfaction. Whether there is any difference between a provision between the father and the children has been matter for consideration and adjudication. The provision which the children take under the will is, first of all, certain premises after his life, next the proceeds of a piece of land which is sold, and the amount of it is wholly uncertain; then there is a share of 332*l.* bank annuities, with survivorship between them, to go over in the event of the children dying

under twenty-one; and then there is 1,000*l.* to each of them to be paid in the event of their attaining twenty-one, if male children, or with regard to the female plaintiff, on her marriage or attaining twenty-one. These provisions are not provisions which would be a satisfaction of a debt between strangers. There is no intention manifested upon the face of the will; there is not only no case of election upon the will, but there is no attempt to dispose of the property to which the children are entitled, there is nothing which can properly be called a case of election. It is therefore totally distinct from *Hinchcliffe v. Hinchcliffe*, which proceeds upon election; and it appears to me to be very much within the case of *Tolson v. Collins*, before Lord Alvanley, in which he held that there was no distinction between the case of satisfaction between a father and the children, and between ordinary debtor and creditor.

These points are very material to be considered, as the question of satisfaction will be raised after the Master has taken the accounts, and in that sense, no doubt, the question of satisfaction may raise the question of election, because the party has his choice between that which he claims as a right or bounty: if he chooses to claim his right, as a right more available, it may be called a case of election, and not in the ordinary sense in which the expression is understood in this court. I do not see any doubt that the plaintiffs are entitled to the account of William Stocken's estate. It is only for the purpose of enabling the parties to determine whether they will choose their right or claim a bounty. The decree pronounced by the Vice Chancellor is entirely silent upon that point.

The plaintiffs are legatees under his will; they claim portions of the real estate, and claim specific property and legacies. I see no reason for precluding them from the ordinary account of the real estate of William Stocken the father; and I think, therefore, the decree must be for that purpose varied. The decree, therefore, will be for the account, as against the father's estate, of the rents and profits of the property to which the children were entitled under the settlement of their mother, received by the father. The Master to inquire what was properly allowed for the maintenance and education of all the chil-

dren; that will, of course, be deducted from what the father has received, and the balance will be the amount of the debt which the plaintiff will be able to establish against the father's estate. I think there should be an inquiry as to the circumstances under which the mortgage upon the property was paid off by the father, in order to raise a claim, if he has any to make, to be reimbursed the monies which he alleges he has so paid; and the Master should, in taking the accounts, ascertain what was the surplus rents and profits beyond what is to be deducted for maintenance and education, and should inquire and state in what manner that surplus was applied and disposed of by the father, with the usual accounts of the estate of William Stocken, which are necessary, not only on behalf of the plaintiffs as legatees under his will, but it would be necessary, in order to have payment of such debt as may be found due from him; but, independently of that, as legatees, they are entitled to the ordinary account of the property of William Stocken the father. I believe that will exhaust all the points, and adjudicate upon all those questions which are at present ripe for decision.

National P. Bank of England v. Marks 50 & 51 Ch. 458.
V.C. }
June 5 & 8. } HAMMOND v. MESSENGER.

Demurrer—Bill—Averments requisite in Bill—Pleading—Assignee of Debt.

An assignee of a debt must shew by his bill, special circumstances to entitle him to the assistance of a court of equity.

An assignee of a debt cannot file a bill against the assignor of the debt and the debtor, unless he shews that he cannot proceed at law.

A demurrer only admits as true, what is alleged by the bill as actual fact, and not mere surmises or pretences, which appear from the tenour of the bill not to be founded in fact.

The bill was filed by the plaintiff against three persons named Messenger, Wilks, and Wooler, and stated, (amongst other things,) that, in April 1837, Wilks and Wooler carried on an extensive business in copartnership as coal-merchants at Dartford: that they had agreed by an instru-

ment in writing, dated 1st of May 1837, to dissolve partnership, and to assign and vest in the plaintiff all the partnership stock, debts, and other joint estate, subject to Wilks's right to account, for the consideration therein mentioned: that the plaintiff had paid divers sums of money to the defendants Wilks and Wooler, in pursuance of the agreement between them and him: that thereupon the plaintiff became entitled to receive all the debts owing by the debtors of the firm: that the defendant Messenger, at the time of the agreement for the dissolution and assignment of effects, &c. to the plaintiff, was indebted to the firm in the sum of 80*l.*; that he, together with the other debtors of the firm, had notice from the plaintiff of the execution of the assignment of the partnership debts to him: that Wilks was in embarrassed circumstances, and had, by his misconduct, created debts, to which the plaintiff was liable, together with Wilks: that an agreement in writing was drawn up, dated the 8th of May 1837, between the plaintiff and Wilks, whereby a general account of the partnership effects was agreed to be taken, and the balance, &c. settled and paid; and that, thereupon, the partnership effects, &c. should be assigned to the plaintiff: the partnership between him and Wilks was legally dissolved, and a power of attorney was given in May 1837 to the plaintiff by Wilks, to enable him to sue for and recover the partnership debts, &c.: that Wilks and Wooler had acknowledged the plaintiff's right to receive all the partnership debts, although they refused to execute an absolute assignment to him thereof: that the plaintiff filed his bill against Wilks and Wooler in November 1827, seeking to have the agreements entered into between them carried into execution, and an injunction was afterwards granted by the Court, restraining Wilks from receiving any of the partnership debts, and that the injunction was still in force. The bill then proceeded to charge, that a debt of 80*l.*, formerly due to Wilks and Wooler, was due to the plaintiff from Messenger, and that Messenger had express notice of the plaintiff's right thereto, and became thereby a trustee in equity for the plaintiff of the said debt: that Wooler and Wilks, and Messenger, colluded together, and that Wooler and Wilks pretended that there was a private debt of Wilks due from

him to Messenger, equal to the debt of 80*l.*, and that Messenger was entitled to set off his private debt against that sum. The plaintiff charged, that Messenger was not so entitled; that Messenger, colluding with Wilks, *alleged*, that he had obtained a release of the debt from Wooler and Wilks; that if any such release had been given, it had been given by Wilks alone, and against the will of Wooler, and fraudulently, and that no money passed between Wilks and Messenger on the occasion of the release being given; and prayed, that Messenger might be decreed to pay to the plaintiff the said sum of 80*l.*; or, if necessary, that an account might be taken of what was due by Messenger to the firm of Wilks and Wooler, and that Messenger might be decreed to pay the plaintiff what might be found due, or that the plaintiff might be at liberty to use the names of Wilks and Wooler in an action to be brought by him against Messenger; and that Messenger might be restrained from pleading to such action any plea or pleas of payment or satisfaction of the said debt of 80*l.*; and that Wilks and Wooler might be restrained from releasing the said debt or discontinuing the said action.

To the bill, the defendant Messenger filed a general demurrer.

Mr. Wigram and *Mr. Girdlestone*, in support of the demurrer, contended, that there was a want of certainty of averment in the bill; that there was no positive charge of a release; that no legal bar was charged by the bill; and that for the purpose of transferring the jurisdiction, a mere allegation contained in the bill, and not true, was not sufficient—*Miford's Pleadings*, 100, 3rd edit.

The other authorities cited in support of the demurrer were—

Barber v. Hunt, cited in *Jones v. Jones*, 3 Mer. 173.

Stansbury v. Arkwright, 6 Sim. 483.

Kemp v. Pryor, 7 Ves. 237.

Attorney General v. Mayor of Norwich, 2 Myl. & Cr. 406.

Mr. Knight Bruce, *Mr. Jacob*, and *Mr. Tripp*, in support of the bill, contended, that allegations of collusion were not necessary in cases like the one before the Court, but only in cases of executor and debtor; that the rules as to executor and debtor depended on peculiar principles,

and that there was no difference, whether the property consisted of land or money, and that a *cestui que trust* of land might always sue the party in possession—*Cathcart v. Lewis* (1). It was further urged, that there was a charge of collusion and pretence against the defendant, contained in the bill, which the defendant could not dispute, but must admit as true, for the purpose of arguing the demurrer; and that admissions (as in the present case) by one of two partners after a dissolution has taken place, was good evidence against the firm—*Wood v. Braddick* (2). *Pritchard v. Draper* (3) was also cited.

THE VICE CHANCELLOR.—Where special circumstances appear in cases like the present, the Court will interfere to assist the assignee to recover the debt assigned to him. If, however, this case before me were denuded of special circumstances, it would be simply the case of a right to sue in the names of Wilks and Wooler for the debt in question of 80*l*. As the case stands, the bill is one which the Court is not in the habit of seeing. This Court permits a bill to be filed by an assignee against a debtor, if the creditor manifests an intention to interpose to prevent the assignee enforcing his right, and this Court possesses a fund out of which it can make the debtor pay in the first instance. I have no recollection of a bill like the present, unaccompanied by special circumstances; and, it is now to be seen, whether there is any thing before the Court to justify the instituting the bill against the debtor at law. The bill states the instrument, by which it was agreed, that the partnership should be dissolved, and the plaintiff pay the debts, and be entitled to the partnership assets; and that Messenger was indebted to the plaintiff as assignee in the sum of 80*l*., a debt due from Messenger to the firm: the bill then proceeds to state the notice to Messenger to pay the debt to the plaintiff; the right of the plaintiff as the assignee thereof; that on the 2nd of October 1837, the plaintiff

applied to Messenger, and that Messenger pretended that he was entitled to pay the same to Wilks and Wooler, and a bill was filed to restrain Wilks from suing for money due to Wilks and Wooler, and from giving receipts; and an injunction has been obtained for that purpose. The bill then states the application to Messenger, and that he, colluding with Wilks, denied the debt: that Messenger became a trustee of the debt—(but that allegation does not make Messenger a trustee, unless the circumstances of the case will have that effect). It then states, that Wilks and Wooler pretend that there is a private debt due to Messenger, and that Messenger has a right to set it off, and that he has a right at law to avail himself of that circumstance; and, further, that Messenger, colluding with Wilks, has possessed himself of a release from Wilks and Wooler. This is an allegation that he has it in his power—that is, it is an allegation of fact; it is then charged, that if such release were given, it was given without Wooler's consent. In *Stansbury v. Arkwright* the bill did not allege that there was any outstanding term or estate, but merely that the defendant threatened to set up some outstanding term or legal estate; and, in the present case, the statement amounts to this, that the defendant has alleged a fact, not that what he has alleged is a fact. If it were stated that there was an intention on the part of Wilks and Wooler to give, and Messenger to receive, a release, that would be a ground for interfering. The bill prays, that Messenger may be decreed to pay the debt, or that an account may be taken, and that Wilks and Wooler may be decreed to allow the use of their names in an action at law, to be commenced by the plaintiff, and that Messenger may be restrained from pleading any release, or availing himself thereof; but what is the meaning of that, I do not know. However, the case is wholly denuded of these special circumstances, upon the existence of which it is the practice of this Court to allow such a bill as the present.

Demurrer overruled, with liberty to amend, on payment of the usual costs.

- (1) 1 Ves. jun. 463.
- (2) 1 Taunt. 104.
- (3) 1 Russ. & Myl. 191.

END OF TRINITY TERM, 1838.

REPORTS
OF
CASES ARGUED AND DETERMINED
IN THE
Court of Exchequer in Equity.

BY
FRANCIS BURGESS, Esq., OF THE MIDDLE TEMPLE,
BARRISTER-AT-LAW.

FROM MICHAELMAS TERM, 1837, TO TRINITY TERM, 1838,
BOTH INCLUSIVE.

CASES ARGUED AND DETERMINED

IN THE

Court of Exchequer in Equity.

COMMENCING WITH

MICHAELMAS TERM, 1 VICTORIA.

C.B. } *Ex parte* PAYN in re THE GREAT
Nov. 10. } WESTERN RAILWAY ACT.

Will—Devise—Trust.

A recommendation by a testator to his devisee, in case of her marriage, to settle the devised estate in a specified way,—Held, not to amount to a trust.

The testator, having by his will, devised certain lands, &c., absolutely to his daughter in fee, subsequently went on as follows : "And I do hereby declare, that the estate and property hereinbefore devised and bequeathed by me to my said dear daughter, is intended as some reward for her affection, unwearied and unexampled attention to me during my illness for many years, and is kept separate from the other interests she will take under this my will, as a memorial and testimony thereof. And I direct my said daughter to keep the buildings, gardens, and premises in good repair, order and condition, and in case she should happen to marry, I strongly recommend her to execute a settlement of the said estate, and thereby to vest the same in trustees, to be chosen and approved by her, for the use and benefit of herself and her assigns for her life; with remainder to her

husband and his assigns for his life; with remainder to all and every the children she may happen to have, if more than one, share and share alike, and if but one, the whole to such one; or to such other uses as my said daughter shall think proper, to the intent that the said estate, in the event of her marriage, may be effectually protected and secured."

The Great Western Railway Company, having purchased a portion of the property in question, for the purpose of their undertaking, and conceiving that the words of the will left it doubtful whether the devisee took an estate for life only or in fee, paid the purchase-money into court, under a clause in their act, which directs that mode of proceeding, in the case of a purchase from infants, tenants for life, and other persons under legal disabilities.

Mr. Monro, on the part of the devisee, who was fifty-eight years of age, now appeared in support of a petition, praying to have the money paid out of court to her absolute use. He contended, that under the words of the will, she took absolutely, and that there could be no trust, because neither the persons to whom the estates were limited, nor the estates themselves, were certain. Even if the petitioner were to marry, and

have children, the estates would be uncertain, for they were to be limited to her husband and children, or to such other uses as she should think proper; but till those events happened, the parties who were to take were decidedly uncertain.

Mr. Stevens, for the company, submitted to the decision of the Court.

LORD ABINGER, C.B.—I am clearly of opinion, that the petitioner has a right to convey the property absolutely; and, therefore, I shall make the order as prayed.

Order as prayed.

C.B. }
Nov. 14. } MILL AND OTHERS v. CAMPBELL.

Discovery—Amendment of Bill after Answer.

An amendment after answer to a bill of discovery, in aid of a defence at law, for the purpose of inquiring and obtaining further information, as to matters stated in the answer, will not be allowed, if the facts disclosed to the plaintiff previous to the filing of the bill, were sufficient to put him upon making such inquiry originally.

On the 24th of September 1834, the defendant, James Campbell, a resident at Para, in South America, entered into a contract with the Brazilian government, to order from England a certain quantity of arms, accoutrements, &c., to be delivered in conformity with models which were delivered to him, he undertaking that the arms should be well manufactured, and of the best quality, according to the patterns, &c. It was provided, that the arms should be for the account and at the risk of the defendant, as far as the city of Para, and should be delivered at the door of the Custom-house of that place, to the agents whom the Brazilian government should name, &c.; and one half of the stipulated price was to be paid immediately, by bills of exchange drawn by the Treasury of the province of Para on the province of Maranhão, and the remainder of the payment was to be made as soon as the arms, &c. should be received by the government, in bills drawn on the same firm.

The defendant gave security for the completion of the contract in conformity with its terms; and it was signed by the defendant James Campbell, and by several members of the Brazilian government on its behalf.

In order to fulfil the contract, the defendant wrote the following letter to Messrs. Bates and Barrows, of Birmingham, ordering the goods:—

“Para, 27th September 1834.

“Gentlemen,—A recommendation from my neighbour and friend Mr. James Henderson, has induced me to take the liberty of addressing you on the following subject. I have lately contracted with the Brazilian government to furnish them with arms and accoutrements as per inclosed list, which they are extremely anxious should be executed with as little delay as possible, and have shipped by this conveyance, the *Para Packet* to London, a box containing patterns of each article for which you have a bill of lading inclosed; I wish you, therefore, to order the box to be forwarded without delay, in order to enable you to prepare executing the order as soon as you receive funds for this purpose, as my friends at Maranhão, Messrs. Mendonça & Season, will be put in funds by the first conveyance from this, to remit you in good bills on London by the first opportunity, and, I trust, the remittance may reach you in all November; the sum to be remitted you will, by last advices of the exchange, be about 3,600*l.* or 3,700*l.*, which, from the nearest calculation that could be made here, will fully cover the cost of the order; should this, however, not be the case, you may rely on being remitted in due time, after hearing from you, in the same manner, for whatever the invoice may exceed the amount of the bills, as I have security from the government to double the amount of the order; or should you require any further information or security, I beg to refer you to Mr. Neil Campbell, Greenock.”

In consequence of this order, Messrs. Bates & Co. through their agents, Messrs. Robertson & Co., of Liverpool, shipped the goods so ordered on board the *Clío*, of Liverpool, insuring them in two policies, which were underwritten by the plaintiffs, from Liverpool to Para. The policies were dated the 7th of August 1835, on which

day the ship sailed, and proceeded on her voyage until the 30th of September 1835, when it was alleged that she anchored off Salinas, in South America, which is at the mouth of the river Para, for the purpose of obtaining a pilot to take her up that river to the city of Para, where, as appeared by the evidence of the only survivor of the crew, she, on the 3rd of October 1835, was, in a hostile manner, attacked, conquered, and taken, skuttled and destroyed by pirates, and the goods comprised in the policies stolen, taken, and carried away by them, and became wholly lost to the defendant.

The defendant having brought actions on the policies against the underwriters, they, on the 24th of November 1836, filed their bill against the defendant, in which they charged the defendant with having entered into the above contract as the agent of the Brazilian government, by whom he had been paid, and that he had no interest in the action; that he had received, at the time, a very considerable sum of money, in respect of the goods, from that government, and that he had, from time to time, since the contract, received large sums of money in respect of the goods, which he sometimes pretended formed an item in account between himself and the Brazilian government, and that in such account that government had given credit to the defendant for the goods; and that there was a large sum of money due by him on the balance of such account. It further charged, that there were various witnesses at Para, Maranham, and elsewhere abroad, who could give evidence to the matters, &c., referred to, whose evidence it was very material for the plaintiffs to have upon the trial of the action; that some letters or correspondence had passed between the defendant and the officers of the Brazilian government, and between the defendant and the captain and mate of the ship, and between the defendant and various other persons residing at Para, Maranham, and elsewhere abroad, relating to the said matters or some of them; that the defendant, or his solicitors or agents, had in their possession, &c. such letters, &c., and various other deeds, books, &c.

It then prayed for a discovery; for a commission to examine witnesses at Para,

Maranhm, or elsewhere abroad, to the end that the plaintiff might have the benefit of their testimony at the trial of the actions; and that, in the meantime, the defendant might be restrained by injunction from proceeding in the actions, and from commencing any other action or proceeding at law, &c.

To this bill the defendant demurred for want of equity, and, after argument, the demurrer was overruled by Lord Abinger, C.B., who granted the injunction. The defendant put in his answer on the 24th of July 1837, in which he denied the agency altogether, and gave a copy of the contract with the Brazilian government, the substance of which appears above. He admitted that, pursuant to the terms of the contract, the Brazilian government advanced to him the sum of 26,234 milreas, being one half the contract price for the goods which he had undertaken to supply to that government, and to whom he had given security for its due fulfilment on his part, and that he and his sureties were liable and bound to repay to the said government the said sum of 26,234 milreas, in the event of the goods not being delivered by him according to the terms of the contract; he, however, had not repaid the same or any part thereof, inasmuch as the Brazilian government having taken into its consideration the impossibility of his being able, under the circumstances of the case, to cause the goods shipped on board the *Clio* to be delivered at Para, had given him time for the fulfilment of his contract, and that he had accordingly ordered Messrs. Bates & Barrows to send to him at Para goods of the same description, value, and amount, as were insured by the policies, to enable him to execute his contract; but denied, except as stated, that the Brazilian government, or any other power, or person or persons, had paid him for the goods, or any part of the costs to which he had been put in relation thereto; but he admitted, that there was now nothing due to him in respect of the goods from the Brazilian government, or any other persons or person, except the underwriters of the two policies of assurance, inasmuch as the goods not having been delivered to the agents of the government according to the contract, it was not liable to him for them, the loss

being his own individual loss. He admitted having brought actions on the policies, and that he intended to proceed in them when the injunction should be dissolved: that the contract set out, and the letter to Bates & Co. were the only contracts entered into by him, with respect to the goods: denied receiving any other money of the Brazilian government, &c., any money for the goods except the sum stated, which was considered by the government and himself as being now in part payment of goods ordered by him of Bates & Co., to replace those lost in the *Clio*, and to enable him to carry into execution the contract. He denied the charge, as to money due by him to the government, upon a balance of account, &c.

The case now came before the Court, on a motion on the part of the plaintiffs, that they might be at liberty, without prejudice to the injunction, to amend their bill, for the purpose of inquiring as to the Brazilian government having given the defendant time for the fulfilment of his contract, as mentioned in his answer: and as to what, if any, correspondence had passed between the defendant and Bates & Barrows, and other persons, as to the supply of fresh arms, &c. to the defendant or the said government: and as to whether some of the arms, articles, and goods, the subject of the insurance, had not got into the hands of the said government, their agents, or soldiers, and as to correspondence relating thereto; and that the plaintiffs might be at liberty to insert all necessary and proper statements and charges for the purpose of obtaining discovery as to the above matters.

Mr. Simpinson and *Mr. G. Richards*, in support of the motion.—The answer of the defendant discloses new circumstances. Information, for the first time, is given that the defendant had further time allowed him to fulfil his contract, and that he had ordered a second supply of arms, &c. It is essential, therefore, that the plaintiffs should know every circumstance connected with this new agreement and order. The first agreement, which is set out *verbatim* in the answer, was in writing; the probability is, that the second was also in writing. There may be recitals in it materially affecting the plaintiffs; shewing,

for instance, either great laches on the part of the Brazilian government; or that some of the arms, &c. have got into its possession; or it may shew, what appears probable from some expressions in the answer, that the ship had arrived at the limits within which the goods were to be delivered, in which case the defendant's liability to the Brazilian government would cease. The correspondence with Messrs. Bates & Co., with respect to the fresh supply of arms, may throw some light upon the subject. The circumstances under which the vessel was lost, are such as to warrant this application. It is clear; that without this further discovery the plaintiff cannot successfully go to trial. *Janson v. Solarie* (1) shews that the Court will, under particular circumstances, allow an amendment after answer to a bill of discovery.

Mr. Spence and *Mr. Purvis*, contra.—The plaintiffs have filed no affidavits as to matters in immediate connexion with the subject of the bill, but rely entirely upon their own suggestions derived from the answer, which distinguishes this motion from that made in *Janson v. Solarie*, which was supported by such affidavits. The plaintiffs ought, at all events, to shew that the defendant has disclosed matters which are material to this case, and which they could not have known before, and that there was no fault on their part, in not inquiring of them in their original bill. The goods mentioned in the contract, which is set forth in the answer, are those which were insured, and in respect of which the bill was filed; they being lost, the defendant came upon the underwriters for the insurance money, who filed this bill, to ascertain what interest he had in them. That interest, whatever it was, can have no reference to any subsequent contract made in relation to other goods. It is not probable, looking at the actual interest of the defendant in the goods lost, that the information sought, will be material to the plaintiffs. The defendant contracted to furnish goods to the Brazilian government; who agreed to pay him down one-half of the stipulated price; it did so pay him; the goods were lost, and the defendant became liable to refund the money he had received. The

(1) 2 Y. & C. 132; s. c. 6 Law J. Rep. (N.S.) Exch. 75.

government, however, instead of calling on him or his sureties to repay, gave him further time to fulfil the contract, allowing him to furnish other goods to supply the loss. Out of these circumstances, nothing material to the plaintiffs can arise; or if anything can, they should have filed affidavits of materiality in support of the motion.

Mr. Simpkinson replied.

LORD ABINGER, C.B.—The only doubt which I have entertained in this case is, whether or not there was a sufficient disclosure of the circumstances before any bill was filed, to lead the plaintiffs to suggest by their bill, whether any, and what, arrangement had been made at any time between the defendant and the Brazilian government in respect of this loss. I admit, that in general, if you direct your inquiries to a specific contract, made at one particular time, and the defendant discloses some other contract made at another time, which is connected with the matters inquired after, but does not amount to a full disclosure of those matters, this would be a ground for allowing you to amend your bill. But where the disclosures already made before the filing of the bill, are sufficient to put the plaintiffs on inquiry, as the disclosures here were sufficient to put the plaintiffs on their inquiry as to the probability of loss, and the nature of the contracts entered into, I am at a loss to see why the original bill should not have been directed to those subjects. I think there is much in what was said for the plaintiffs, as to the first contract being set out in the answer, and the other not; but still I think the plaintiffs come too late to avail themselves of any inquiries which might arise from this circumstance. The underwriters in this case were aware when they filed their bill, that the ship had been lost; of the particulars of that loss; that the cargo had been taken by pirates; that the party who had ordered the cargo had security from the Brazilian government to twice the amount of the cargo, and had been in some way paid; and yet that he was seeking to recover the insurance money in an action. Upon the supposition that he had been paid, they make certain inquiries on that head, to which, he replies

that he has been paid half the amount. They then find their case incomplete, without further information as to how, and under what conditions the payment was made. But why could they not have asked him this by their original bill? They might then have put to him the questions—Have you been paid? and if not paid the whole, how much have you been paid, and upon what terms have you been indemnified as to the remainder?

Although one is desirous of giving room for every inquiry in these cases, yet if a party neglects his opportunities of inquiry in the first instance, he ought not to be allowed to make suggestions afterwards, which he should have made at first. I should have thought, that in this bill, the plaintiffs would have pointed their inquiries to every circumstance, under which the arrangement could have been made.

The ground, therefore, on which I decide this motion, (and it is a little beside the arguments,) is this, that the plaintiffs had the opportunity of making the inquiries originally, which they now seek too late.

Motion refused, with costs.

ALDERSON, B. }
Dec. 1. } SAME V. SAME.

Witness—Motion for Commission abroad, after Answer.

The Court will, on the motion of the plaintiff, after answer to a bill of discovery, and on discovery arising out of the answer, grant a commission to examine witnesses abroad, which, although prayed for by the bill, had not been had; but in so doing, it will impose severe terms.

Mr. Simpkinson and Mr. G. Richards now moved on behalf of the plaintiffs, that one or more commissions might issue for the examination of witnesses at Para and Maranhão, in the Brazils, returnable without delay, and that the defendant's clerk in court might, within four days after notice, join and strike commissioners' names with the plaintiffs' clerk in court; or in default thereof, that the plaintiffs might be at liberty to sue out a duplicate or triplicate of such commission or commissions, if necessary; and if the defendant joined in such

commission, seven days' notice of the execution of the commission to the defendant's commissioners, or any one of them, might be deemed good notice; and that such commission or commissions might contain the usual clauses for swearing an interpreter, and translating the interrogatories and depositions, if necessary; and that an injunction might issue to restrain the defendant from all further proceedings in the action, until the return of the commission or commissions, and publication should have passed in the cause; and that the defendant might, in four days after the date of the order to be made in this application, produce and leave in the hands of his clerk in court for the usual purposes, all the deeds, books, papers, memorandums, and writings admitted by his answer.

In support of the motion, the affidavit of Joseph Lowless, the solicitor to the London Assurance Company, co-plaintiff in this suit, was read, in which he stated, that, in order to sustain their defence to the action, it would be absolutely necessary to examine witnesses resident at Maranham and Para, for the purposes of obtaining their testimony on the trial, on behalf of the defendants-at-law, without which they could not safely proceed to trial.

Mr. Spence and Mr. Purvis, contra, contended, that this motion came too late, the application, if intended to be made, ought to have been earlier.

ALDERSON, B. said, he did not think that the delay had been of such a nature as to deprive the plaintiffs of the benefit of the inquiry they sought; and more especially, as, in his opinion, such an investigation might be necessary to attain the ends of justice. He would, however, in consequence of the delay, bind the plaintiffs under severe terms: he would direct them to pay the amount of the policy, with interest for one year last past, at the rate of 4l. per cent., into court, to be invested in Exchequer bills. The plaintiffs to pay the costs of the motion. The commission to issue, and the injunction to be revived in the terms of the motion. The documents in possession of the defendant's solicitors in this country to be produced here. The books at Para to be inspected there on

oath; sealing up those parts not relating to the matters in question.

C.B. }
Nov. 21. } KING v. ABBOTSON.

Practice—Trustee—Injunction—Receiver.

An injunction having been granted, and no motion to dissolve on the coming in of the answer, a receiver appointed as of course.

It is not a sufficient ground for dissolving an injunction, that the allegations, upon which it was granted, are denied by the answer, when the answer discloses a sufficient ground for sustaining it.

This was a bill filed on behalf of an infant against the surviving trustee and executor of her father, the testator, imputing breaches of trust, irregular habits, and want of responsibility, to the trustee. By his will, the testator directed a part of his estates to be sold forthwith, and the produce to be immediately invested in other land to be settled to the same uses, or in government securities.

Immediately after the bill was filed, an injunction was obtained *ex parte*, to restrain the trustee from receiving any further part of the rents and profits. The affidavit in support of the injunction stated, that the trustee was a man of little or no property; that he had, since the death of the testator, become addicted to drinking; that he had misapplied the trust property; and that if he were permitted to receive any further sums there would, in the opinion of the deponent, be great danger of the money being lost.

The answer was afterwards filed, and the defendant thereby denied the irregularity of habits imputed to him, asserted his solvency, and denied the breaches of trust; but the accounts set out in the schedules to the answer shewed, that the defendant, immediately after the death of the testator, borrowed money at interest upon the ground of wanting it to pay debts: that, though he sold immediately the estates directed to be sold, he did not, till after the bill was filed, a period of several years, invest in the funds or in land, any part of the produce, but that he had, from time to time,

deposited monies with his bankers, at interest, and lent other monies also at interest, but without security.

The defendant did not, on his answer coming in, move to dissolve the injunction, but he was subsequently ordered to transfer and pay in the stock and monies admitted by his answer.

Subsequent rents having accrued due, a motion was now made, on the part of the trustee, to discharge the injunction, and on behalf of the infant to appoint a receiver.

Mr. Elderton, in support of the application for a receiver and also in opposition to the motion to dissolve the injunction, contended, that the injunction and the appointment of a receiver were both necessary for the protection of the infant's interests in the property.

Mr. Booth, *contra*.—No sufficient reason has been given for disturbing the appointment of the testator, who had especial confidence in the defendant. The smallness of his property is no objection, as the testator, who knew that, thought proper to appoint him.

[*LORD ABINGER, C.B.*—That alone is not a sufficient ground.]

If the objection relied upon is, that the defendant is an improper person to receive the rents, the *ex parte* application for an injunction was irregular, as the proper application in the first instance was for a receiver.

[*LORD ABINGER, C.B.*—This was an injunction till answer; that answer has been put in nine months since, and yet the defendant has made no application till now to dissolve the injunction. Whatever the plaintiff might have done then, he comes now to do what is right. I think it was a proper case to apply for an injunction.]

This was an *ex parte* application on the other side. Now, the conditions on which such applications must be grounded, are, that the party praying *ex parte* for an injunction must shew an urgent and immediate danger, and that he has used due diligence. There is nothing here to shew that there was any immediate danger, nor was any suggested when the application was made. The injunction was obtained *ex parte*, and without the attention of the Court being called to all the facts. It was, therefore, improvidently granted, and the allega-

tions upon which it was obtained are entirely denied by the answer, and the defendant is therefore now entitled to dissolve it. When the injunction is discharged, the whole ground for the appointment of a receiver is removed.

Mr. Elderton, in reply.—The testator had no especial confidence in the defendant. In the first instance, he appointed the widow as guardian to the child; but, in case of her second marriage, the testator appointed Edmund Rudd and the defendant to succeed her in that office, they having already been appointed by the will as trustees to the property. Rudd, the other trustee and guardian, is dead, and the mother has married again. The defendant cannot complain of the application for the injunction being *ex parte*, as the affidavit upon which the injunction was granted rendered it imperative upon the Court to grant it; and, though the answer denies some of the allegations in the affidavit, it discloses quite enough to shew that the defendant ought to have been restrained. The defendant borrowed money at interest, without any necessity; and, when he had realized the estate, instead of investing it as directed by the will, lent it on mere personal security.

LORD ABINGER, C.B.—It appears to me, that this injunction was properly granted. The affidavit stated, that the estate of the infant was in danger, that the defendant was a person of intemperate habits, was not a housekeeper, and had refused to account. Under these circumstances, I think I was right, on an *ex parte* application, in granting the injunction. The defendant has allowed that injunction to remain a considerable time after the answer was put in, without applying to dissolve it, and has received the rents and profits of the estate in defiance of the injunction. The matter disclosed by his answer, coupled with the other circumstances which appear, I think make it expedient that the injunction should continue until the Master has made some report on the *bona fides* of the case; and that being my opinion, a receiver must be appointed as a matter of course.

Receiver appointed in accordance with the terms of the motion, and injunction continued.

C.B. }
Nov. 21. } CREASE V. PENPRAISE.

Injunction—Principal and Agent—Accounts.

An action having been brought for wages by a toller or agent of tin mines, against his principal, the lessee of the mines, a bill for an account, and injunction to restrain the action, was filed by the defendant at law. After answer put in, admitting unadjusted accounts, the Court refused, on motion, to dissolve the injunction, as the question might be decided, and the accounts taken in a court of equity.

The defendant, who for several years previous to 1834, had been the toller, or agent of the defendant, the lessee of tin mines in the duchy of Cornwall, for receiving the tolls and conducting the works of the mines, for which he, by agreement, was to receive an allowance of two shillings in the pound on the toll of tin, brought his action for monies paid to the plaintiff's use, and for special services performed; and in his particulars claimed various sums as due to him from the plaintiff from 1827 till the time of his dismissal in 1834. The plaintiff thereupon filed this bill, stating that all accounts were adjusted between the parties in 1833; that from that period till the defendant's dismissal, he had received the tolls of tin, of which no account had been rendered to the plaintiff, and of the amount of which the defendant alone was cognizant; that he had been applied to for such accounts, but had refused to render them, stating that no balance was due; and the bill prayed for an account, and an injunction to stay the proceedings at law. The defendant put in his answer, admitting that there were accounts between him and the plaintiff, but alleged that the settlement in 1833 did not include sums due to him for extra services, and other matters. He then stated certain sums as having been expended by him for the plaintiff, &c.

Mr. G. M. Butt and Mr. Favell, for the plaintiff, shewed cause against dissolving the injunction. This is a proper case for the interference of the Court, as it is admitted by the defendant that the accounts between him and the plaintiff are unsettled, and he only can say, what is the

amount of tolls, &c. received by him from the mines, or of monies he has paid to the plaintiff's use. He has delivered a bill of particulars of demand from the year 1827 to 1834, taking no notice of what he has received for the plaintiff after the settlement in 1833, and not denying that the accounts were then settled. He had no right thus to bring his action against the plaintiff, as if the plaintiff had no counter-claim against him. The bill is founded on the same principle as bills against stewards, agents, &c., and it is sustainable on stronger grounds, for in such cases, the plaintiffs seek for an account of the receipt of rents, the amount of which might be as well known by the principal as the agent; but here it is of monies, which no one but the agent can give an account of. If the action were allowed to go on, it must end by a reference.

Mr. Rogers, contra.—The only question is, as to what is the remuneration to which the defendant is entitled for his services; and that is a question to be decided by a jury, and not by a court of equity. The question of wages is entirely distinct from those raised by the bill; and it is not the province of a court of equity to determine what wages are proper for a servant or agent to receive. With regard to the particulars of demand, they are in the usual form.

LORD ABINGER, C.B.—If it should become necessary to try the question by a jury, this Court has the power of giving the defendant that advantage. This is the case of an agent bringing an action for his wages, against his principal: he admitting that there are unadjusted accounts between him and his principal, who says, "I have a right to that account before I pay you." In my opinion, this is a proper occasion for a court of equity to interfere, and say to the agent, "You may have your wages, but you must also say, what is due from you to your principal." I quite agree with the observation, that if this action were to go on, it must end in a reference: and, if so, I cannot say that it is not a proper case to be decided by this Court, and to be sent before the Master to take the accounts.

Injunction continued.

C.B. }
Nov. 10. } PRICE AND OTHERS v. NORTH.

Creditors' Suit—Sale—Purchase—Petition—Time.

A suit was originally instituted by the plaintiff on behalf of himself and other creditors, in which a sale of certain lands, &c. was ordered for their benefit, and conditions of sale settled by the Master, one of which was, that if there should appear any error or mistake in the description of the premises, or any other mistake or error whatsoever, respecting the premises or any part thereof, such mistake or error should not annul the sale, but a compensation or equivalent be given or taken, as the case might require; such compensation or equivalent to be determined by the Master, in case the parties could not agree, &c. One of the lots was not sold at the sale, but afterwards by private contract, subject to the same conditions to A. It was described as containing fourteen acres, which were proved to be customary acres, or twenty-seven statute acres. The sale was approved by the Master and confirmed by the Court. Four years afterwards, a creditor presented his petition, praying for a reference to the Master to ascertain and report what amount of compensation beyond the amount of the purchase-money agreed to be given, should be allowed for the excess in the quantity of land comprised in the lot purchased, or that the order might be discharged, and the premises put up for sale again:—Held, that the petitioner came too late, in petitioning four years after discovery.

This was the petition of William Meyrick, of Merthyr Tydvill, in the county of Glamorgan, one of the creditors of Roderick Gwynne, deceased; and it stated, that this suit was originally instituted by Roderick Price, (since deceased,) and David Jenkins, on behalf of themselves and other creditors of Roderick Gwynne, deceased, the testator in the pleadings of the cause mentioned, for the payment of his debts out of his real and personal estates; and it was in July 1810 referred to the deputy remembrancer of the court to take an account, by whom, amongst other things, it was reported that the petitioner was a special contract creditor for the sum of 358*l.* 9*s.* 8*d.* It was directed by an order

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of the Court, which bore date the 21st of May 1829, that it should be referred to the Master to approve of a proper scheme for the sale of the testator's real estates, and that he should accordingly proceed to sell them either together or in lots, and upon such terms and conditions as he should direct, and at such time or times as he should appoint. The purchase-money was directed to be paid into the Bank of England, with the privity of the Accountant General, in trust, to the account of the testator's estate, to abide the further order of the Court; and it was further ordered, that, for the purposes of such sale, proper particulars of the real estate should be laid before the Master.

In pursuance of this order, certain particulars of sale were laid before the Master; and, amongst others, those as to lot 50, were as follows:—"Seven fields, fourteen acres more or less, part of Godrecoed Farm, tenant John Hughes, yearly rent 42*l.*, tenant from year to year."

Amongst the conditions of sale laid before and approved by the Master, the 8th and 9th were as follows:—"8th—That if there should happen any error or mistake in the description of the premises in the preceding particular, or any other mistake or error whatsoever, respecting the said premises, or any part thereof, such mistake or error shall not annul the sale, but a compensation equivalent shall be given or taken, as the case may require; such compensation or equivalent to be determined by the said Master, in case the parties differ about the same.

"9th—Should any purchaser neglect to pay his purchase-money, agreeably to the third condition, from what cause soever it may be, he shall pay interest on his purchase-money from that time, at the rate of 4*l.* per cent. per annum till the time of payment, and the vendor shall be at liberty to take the Master's report of the bidding, and obtain the usual orders for confirming the same, and for payment of the purchase-money, in regard to any purchaser making default in payment of his purchase-money, at the expense of the purchaser making such default."

The estates were accordingly advertised for sale before the Master, and the sale took place at the Castle Inn, Merthyr Tydvill,

C

on the 20th of July 1831, in 57 lots, but lot 50 was not sold. Soon afterwards, one of the plaintiffs, (David Jenkins,) entered into a written contract with Henry Jones, bearing date the 7th of November 1831, for the sale of the hereditaments contained in lot 50, for the sum of 973*l.* 14*s.*, according to the before-mentioned conditions of sale; and it having been referred to the Master, he, by his report of the 5th of May 1832, certified that the contract was a proper contract, and for the benefit of the several parties interested in the real estates of the testator; which report was confirmed by an order of the Court of the 21st of May 1832; and Jones was declared the purchaser at the price named, and that he should be at liberty on or before the 12th of June following, to pay the purchase-money into the Bank of England, as directed by the decree, and that he might therefore be let into the possession of the premises, and into the receipt of the rents and profits thereof, as from the preceding Lady-day.

It was alleged by the petitioner, that H. Jones did not pay the purchase-money at the time mentioned, and that no conveyance had been executed to him; but that he had since taken possession of the premises, and had continued in such possession and in receipt of the rents, &c.

It was further alleged, that the seven fields comprised in lot 50, were in the particulars of sale incorrectly described, inasmuch as the admeasurement thereof was stated to be fourteen acres, whereas, in fact, they consisted of twenty-seven acres and upwards. That the sum of 42*l.*, stated as the rent, was much less than the value, and that H. Jones shortly after he entered into the contract, entered into an agreement, by which he let the property to a responsible tenant at the yearly rent of 80*l.* That the actual value at the time of the contract was 1,600*l.*, and that it was well known to Jones that the premises consisted of twenty-seven acres, and not fourteen acres, as erroneously stated in the particulars of sale. That Mr. Philip Vaughan, from the commencement of the proceedings, had acted as solicitor for all the parties interested in the suit, and had the sole management thereof, and the sale. That the petitioner, on discovering the error,

applied to Mr. Vaughan, and requested him to take the necessary proceedings, as such solicitor, to protect the creditors' interests in the premises, by causing application to the Court for compensation or equivalent from Henry Jones, in respect of the excess in the quantity of acres above the quantity stated. That in February 1837, a petition was presented on behalf of David Jenkins, praying (amongst other things) that it might be referred to the Master, to ascertain and report whether any and what compensation should be given, by reason of any error or mistake in the description of the premises in lot 50; notice of which was duly served on Henry Jones, but which had since been neglected, and without the present petitioner's consent withdrawn; and he believed the agent of P. Vaughan had been instructed by him to take no further steps in the matter, but to obtain an order that Henry Jones should pay his purchase-money into court, and to procure a conveyance to him of the premises comprised in lot 50, in pursuance of the contract. That P. Vaughan was employed by Jones in the matter of the purchase, and was instructed by him to prepare the conveyance and complete the purchase. That the petitioner took no part in the proceedings in the suit, nor gave any direction thereon, nor did he at any time approve of or sanction the sale of lot 50 to H. Jones, and that at the time of the sale, and of the confirmation thereof by the Court, he had no knowledge of the real value or extent of the property comprised in the lot.

He then prayed that it might be referred to the Master, to ascertain and report what would be the proper amount of compensation beyond the amount of the purchase-money agreed to be paid by Jones, for the excess in the quantity of the lands comprised in lot 50, beyond the description of the quantity contained in the particulars of sale, and that the same with interest thereon, together with the original purchase-money, and the interest due thereon, might be ordered to be paid by Jones to the credit of the suit, or that the order of the 31st of May 1832 might be discharged, and that the premises might be again put up for sale by auction, with the approbation of the Master, and the purchase-money

paid as by former order,—the petitioner offering, upon such sale, to advance 10*l.* per cent., upon the sum agreed to be paid by Jones, in case more should not be offered. And that Jones might be ordered to account for the rents of the premises from the time when he so entered into possession; and for further orders, &c. The petition was supported by affidavits.

In opposition to it, the affidavit of Henry Jones denied that there was any mistake or misapprehension on the part of the vendors or their agents, either at the time of sale, or upon entering into the contract, as to the extent or average of the lands, &c. in lot 50, and that it was distinctly stated that the lot, as given in the particulars, had been computed according to the old customary or parish measure; but that the same were in fact twenty-seven chain or statute acres, or thereabouts. That at the sale, the highest *bond fide* bidding for it was 925*l.* That in the early part of January 1832, the defendant remitted to Messrs. Vaughan & Bevan, as the solicitors of the vendors, the sum of 1,000*l.*, as well in payment of the purchase-money as that of another small lot purchased by him at the sale, the receipt of which they had acknowledged by letter dated the 9th of January 1832. That soon after the contract, he had made a *bond fide* offer to sell the premises again for the same money, but could not. That after purchasing it, he for eighteen months farmed it himself, and improved it, and then let it, with other property to the value of 8*l.*, for a term, at 80*l.* a year, to a Mr. Crawshaw, whose object was to secure to himself the free use of the river Taff, for the purpose of his iron-works, except for which, it was not worth more than the price given for it.

This affidavit was supported by others, among which, was that of Mr. P. Vaughan, which stated, that at the request of the creditors, he attended a meeting of them on the 15th of April 1837, at which the petitioner was requested to attend, when the propriety of making an application to the Court, in reference to the property comprised in lot 50, for the purpose either of procuring a re-sale thereof, or obtaining a compensation by reason of a mistake in the description of the premises, was fully

discussed and maturely considered; and the creditors at such meeting, unanimously resolved not to take any proceedings in the matter, and instructed him, as the solicitor for the estate, to proceed forthwith to confirm the sale to Jones; in conformity with which instructions, he accordingly obtained an order for paying the purchase-money into court, which he believed had been done.

From circumstances stated, it was alleged that the petitioner knew the value of the land in 1832.

Mr. Simpson and *Mr. Booth*, for the petitioner. — The 8th condition of sale says, that if there should appear any error or mistake in the description of the premises, such mistake or error was not to annul the sale, but a compensation equivalent was to be given or taken, as the case might require, such compensation or equivalent to be determined by the Master, in case the parties could not agree. This was a mistake, which made a considerable difference in the quantity of land purchased by Jones, and which came clearly within the provisions of that condition. Besides, the purchase-money was not paid into court at the period fixed by the Master, or for some time after, and then only by an order on petition, after the present petition was under consideration. The circumstances of the case compelled the petitioner, who was a creditor to a large amount, for the benefit of himself and the other parties interested in the estate, to adopt the course he was now following.

Mr. James, for the purchaser, Mr. Jones; and—

Mr. Sharpe, for the plaintiff on the record, opposed the petition, contending, in the first place, that the petitioner, although a creditor, yet not being a party upon the record, had no right to make this application; and cited a manuscript case, decided by the Lord Chancellor, when Master of the Rolls; (*Turner v. Radford*), in support of this position. But even if he had such a right, he was barred by his own *laches*, in suffering the matter to stand over from 1832, when it was clear he must have known the value of the property, till the presentation of this petition. With respect to the non-payment of the purchase-money, it was clearly proved that Mr.

Jones paid his purchase-money to the solicitor of the creditors, the party authorized to receive it, in 1832.

LORD ABINGER, C.B.—If I had considered it necessary to decide this petition upon the ground of Mr. Meyrick not having a *locus standi* in this court, as not being a party to the record, and having no right to present any petition, I should have desired a little time for consideration, but I do not think it necessary in this case to give any opinion upon that point.

The petitioner wishes me to modify the order, by referring it to the Master, to ascertain what addition is to be made on the ground of a mistake or misdescription in the quantity of land purchased by Mr. Jones, or to cancel this contract; and this he does after the lapse of a period of four years from the confirmation of that contract; and he grounds his application on the conditions of sale. I know courts of equity go a long way in cases of misdescription; and I own that if, in this case, the misdescription had been such as had deceived the purchaser, it might have been a ground for his seeking to avoid the sale. I admit, that courts of equity have modified payments in cases of misdescription; but, I think, not in cases like this. But must not something be said as to lapse of time? I agree to the proposition of Lord Eldon, that there must be some limitation as to the time within which these applications should be made; for if, after a reference to the Master and a confirmation of his report, I allow you, after a lapse of four years, to re-open the minutes, why may I not do it after twenty years? The petitioner in this case applies to the Court to cancel the contract, or to send it to the Master to state the amount to be paid beyond that fixed by the contract, and this four years after a discovery.

The ground upon which I shall dismiss this petition is this:—that even assuming for the sake of argument, that Mr. Meyrick had a right to petition, and that the events would have justified him in filing a petition when he made the discovery; yet that he has delayed so long as to deprive him now of any such right; for I must assume from the evidence that he was acquainted with the facts when the case was

before the Master in 1832, yet he comes for the first time in 1837, four years afterwards, and makes this application, contrary to the wishes of the other creditors.

There are two reasons why length of time ought to be a bar to applications of this sort;—first, because the purchaser, upon the faith of the contract, and its confirmation by the Court, might have laid out large sums of money in improvements on his purchase, and have thus modified his interest in it; besides, property near large manufacturing towns is constantly changing its value;—and, secondly, as regards the interests of the creditors. It appears very probable, if sent back to the Master, that he would make no alteration, the length of time rendering it difficult to ascertain what the value was; and, if so, why should it be referred?

With respect to the non-payment of the money into court, it is agreed, that although Mr. Vaughan was the solicitor of Jones, the purchaser, yet he was also the solicitor in the suit for all the creditors; and, if so, Jones paying his money to Mr. Vaughan, which he appears to have done in 1832, must be considered as equivalent to his paying it into court. Had he paid it to his own solicitor, who was not the solicitor of the creditors in the cause, the case would have been very different. He, therefore, must not be prejudiced by the money not being paid in at the time.

I reject the petition, on the distinct ground, that the petitioner knew, or ought to have known, the subject-matter of which he complains, when the question was raised in the Master's office, notwithstanding which he has delayed till 1837, before he files his present petition. And this being my opinion, it must be dismissed, with costs.

Dismissed accordingly.

ALDERSON, B. }

1837.

Dec. 8, 21. }

POLLEY v. SEYMOUR.

Devise—Conversion.

Testatrix devised all the rest, residue, and remainder of her real and personal estate, after payment of her debts, certain legacies, &c. to the use of a trustee, his executors, &c., upon trust, to retain and keep the same

in the state it should be in at the time of her death, as long as he should think proper, or to sell and dispose of the whole or such part thereof, as and when he or they from time to time should think expedient, &c.; and in speaking of the trust she used the words, "And for facilitating such sale and sales as are by me hereinbefore authorized to be made of my real and personal estate," &c.:—Held, under the circumstances, that the testatrix did not intend an absolute conversion of the real property into personality.

The original bill, which was filed in 1820, and amended in 1822, stated, that Salome Turst, late of John Street, near Tottenham Court Road, in the parish of St. Pancras, being possessed of considerable estates and effects, both real and personal, comprising, amongst other things, a certain property or premises called the Pantheon, in Oxford Street, to the greater part whereof she was entitled in fee simple, and to the remaining part for a long unexpired term, duly made and published her will, which bore date the 13th of September 1803, whereby, after giving certain specific and pecuniary legacies, she gave, devised, and bequeathed all the rest, residue, and remainder of her real and personal estate, whatsoever and wheresoever, after payment of her debts, the above-mentioned legacies, and her funeral and testamentary expenses, unto and to the use of William Seymour, of Margaret Street, in the parish of St. Marylebone, in the county of Middlesex, his executors, administrators, and assigns for ever, according to the different natures and qualities thereof respectively, upon trust, to retain and keep the same in the state it should be in at the time of the decease of the testatrix, as long as he should think proper, or to sell and dispose of the whole or such part thereof, as and when he or they, from time to time, should think expedient, either by public auction or private contract, and in such lots and parcels as he or they should think best and most advisable, unto any person or persons who should be willing to become the purchaser or purchasers thereof, or of any part thereof, for the most money and best price or prices that could or might, at the time or times of such sale or sales, be reasonably

had or gotten for the same; and then upon trust to place out and invest the money to arise and be produced from or by such sale or sales, together with all ready money which the said testatrix should leave at the time of her decease, and all sum and sums of money which should be collected or got in by him or them, and which should be due or owing to the said testatrix at the time of her decease, in his or their own name or names, and in the name of some two of the residuary legatees thereafter named, in the public stocks or funds, or upon real or government securities of and in Great Britain, at interest; and then she willed and directed that the said William Seymour, his heirs, executors, or administrators, should stand and be possessed of and interested in all such the general residue of her real and personal estate; and from and after any such sale, then of the stocks, funds, and securities, wherein the same or any part thereof should have been laid out or invested, in trust, by and out of the rents, issues, profits, &c., interest, dividends, and proceeds thereof, to pay the several annuities following, that is to say, to William Polley and his assigns, one clear annuity or yearly sum of 100*l.* for his natural life; to Mary Polley and her assigns, one clear annuity or yearly sum of 30*l.* for her natural life; to Sarah Crode and her assigns, one annuity or clear yearly sum of 50*l.*; to Ann Agnes Pitcairn Webster, Jesse Webster, and Joanna Webster, daughters of Charles Webster, therein described, and to the survivors and survivor of them, one annuity or clear yearly sum of 60*l.* during the life of the longest liver of them; to Rebecca Harvey and her assigns, one annuity or clear yearly sum of 20*l.* for her natural life; to Elizabeth Dunkerley and her assigns, one annuity or clear yearly sum of 50*l.* during her natural life, to commence and be computed from the day of the death of the said Sarah Crode; and to Rebecca Harvey, one annuity or clear yearly sum of 50*l.* for her natural life, to commence and be computed from the day of the death of the survivor of them, the said Sarah Crode and Elizabeth Dunkerley; to Philip Elias Jeffery (in the will, by mistake, called Philip Jefferies) and his assigns, one annuity of 20*l.* for his natural

life; and to the said William Seymour, one annuity or clear yearly sum of 50*l*. during his natural life, which said several annuities or yearly sums the testatrix directed should be paid free of all taxes, and by equal half-yearly payments, and that the first half-yearly payment thereof should be made on the day six months next after the testatrix's decease; and from and after full and entire payment and satisfaction of the said several annuities and all arrears thereof, then the testatrix directed that the said William Seymour, his heirs, executors, and administrators, should stand possessed of all the rest, residue, and remainder of her said real and personal estate and effects, and of the stocks, funds, and securities wherein the same or any part thereof should have been invested, and the rents, issues, and profits, interest and dividends, and produce thereof, in trust, for William Polley, Mary Polley, Sarah Crode, Rebecca Harvey, and William Seymour, in equal shares and proportions as tenants in common, and not as joint tenants, and for their respective heirs, executors, and assigns, according to the different natures and qualities thereof; and the testatrix, for facilitating such sale and sales as were by her thereinbefore authorized to be made of her real and personal estate, declared that the receipts of the said Wm. Seymour, his heirs, executors, and administrators, should from time to time be good and sufficient discharges. The will contained also a proviso, that if the residue, or the stocks, funds, or securities, in which the same should be invested, should not be sufficient from time to time to answer and pay all the annuities in full, then the annuities should abate proportionably one with the other; and the testatrix appointed the defendant William Seymour sole executor of her will.

The testatrix died in 1805, without revoking or altering her will, leaving an heir-at-law her surviving. Upon her death William Seymour proved the will, took upon himself the trusts, and soon after entered into possession of all the real estates and personal effects of the testatrix; and out of the produce thereof, he paid and satisfied all the testatrix's funeral, &c. expenses and just debts, and also all the specific and pecuniary legacies given by

the will, and for some time paid the annuities.

Sarah Crode died in the lifetime of the testatrix; Mary Polley, one of the residuary legatees (afterwards Jefferson) died in 1807, leaving her husband, the defendant, John Jefferson, her personal representative, and her child, the plaintiff, Mary Jefferson (afterwards Bewley), her heir and real representative; Rebecca Harvey, in November 1804, married the plaintiff, John Carver; plaintiff, Thomas Egerton (since dead), by assignments became entitled to the annuities given by the will to Agnes Ann Piteairn Webster, Jesse Webster, and Joanna Webster. In December 1830, Wm. Polley, another of the residuary legatees died intestate, leaving the defendants, a widow, and other children, besides the present plaintiff, who was his son and heir, who, having taken out letters of administration to his father, is now his real and personal representative.

The bill, after alleging that William Seymour had discontinued paying the annuities, which were considerably in arrear, and refused to account and pay such annuities, on the ground that the estate and effects of testatrix, which he had been able to get in, had been expended by him, in the payment and discharge of the funeral and testamentary expenses and debts of the testatrix, and of the specific and pecuniary legacies given by her will, &c., charged the belief of the plaintiffs, in the truth of the allegation of the defendant, William Seymour, that the property devised was of such a nature that the defendant could not well and effectually execute the trusts of the will, and that the property called the Pantheon Theatre was in a very embarrassed state, and that the proprietors, lessees, or managers of it, had been for some time past, and then were, unable to pay the rent for it, and thereupon that he was desirous either of being released or discharged from the trusts, or of acting therein, and in the management, sale and disposal of the property under the direction of a court of equity; and it alleged that the plaintiffs had been unable to discover who was the heir-at-law of the testatrix, or whether such heir-at-law was within the jurisdiction of the Court.

It then prayed that the will might be

established, and the trusts carried into execution under the decree of the Court, and that an account might be taken of the personal estate and effects of the testatrix (not specifically bequeathed), possessed or received by the defendant William Seymour, and of the produce thereof, and that an account might also be taken of the real estate of the testatrix, and of the rents and profits thereof, possessed or received by the defendant, or by any person by his order or for his use, and of the arrears that were then due to the plaintiffs respectively, upon account of their respective annuities, and that the real estates of the testatrix might be sold, and that the clear residue might be divided amongst the defendant and plaintiffs respectively, to whom such residue was given and bequeathed, according to their respective interests therein; and that one or more proper person or persons might be appointed to manage the property, and to receive, collect, and get in the same or the rents and profits thereof; and that the defendant Wm. Seymour might be restrained from collecting, getting in, or receiving the same, or from interfering in the property or the management thereof, &c.

To this bill the defendant Wm. Seymour put in his answer, stating, amongst other things, the state and condition of the property called the Pantheon, his desire to be discharged from the trusts, or if the Court should think fit, of acting in the trusts and in the management, sale, &c. of the property, under the direction of the Court, upon being indemnified in so doing; that in his judgment a sale would not be expedient until the leases of and in the shares had expired; that he was desirous that a receiver should be appointed to collect and receive the rents, and to apply the same against loss by fire, and in satisfaction of the annuities; that he was unable to discover who was the heir-at-law of testatrix, &c.; and claimed such interests, &c. under the will, as in the judgment of the Court he might be entitled to, and submitted to act as the Court should direct.

The cause came on for hearing in 1822, when the original decree was made, for an account, a receiver, &c. William Polley, the original plaintiff, died in 1830, and the suit was revived in 1831 by his son, the

present plaintiff. It was further revived on the marriage of Mary Jefferson with Joseph Bewley. Orders were subsequently made for the sale of the property, &c., and it was sold, but, the purchaser not making good his purchase, the contract was rescinded. It had since been offered for sale and bought in. It was afterwards let upon a repairing lease for sixty-one years, from Lady-day, 1834, at a rent of 800*l.* a year to the present lessee, who had converted it into the Pantheon Bazaar. This arrangement having been effected, the cause came here on further directions, and the object was to have the rights of the parties declared; and the grand question was, whether, under the devise and dealing with it in the will, the Pantheon property, which was freehold, was intended by the testatrix to be converted out and out into personalty, or whether a discretion was vested in the trustee to sell it or not, when and how he might think proper.

Mr. Stuart and Mr. Bellasis, for the plaintiffs, except Wm. Seymour.—There has been no conversion. At the time the suit was instituted there had been no conversion out and out. If there had been an absolute direction that the property should be sold and converted into money, and the money to be paid, that would have been a conversion out and out. If the individual died before actual conversion, they might elect to take it as land; if an option was given by the testator, there was no conversion till the option was exercised. At all events, the legatees have an option, and here the option is to take it as real property—*Ackroyd v. Smithson* (1), *Walker v. Denne* (2), *Kennell v. Abbott* (3), *Thornton v. Hawley* (4). Although there was a decree for a sale before the death of Polley the father, this property has not yet been converted, for the theatre still remains real estate.

Mr. G. Turner, for the plaintiff William Seymour.—The question is, whether an option was given by the will to Seymour to sell or not to sell. There was no clear direction; he was "authorized," not "directed." The will, in express words, gives a discretion to Mr. Seymour to sell or not

(1) 2 Bro. C.C. 593.

(2) 2 Ves. 170.

(3) 4 Ves. 802.

(4) 10 Ves. 129.

as he may think proper—*Cole v. Wade* (5), *Walter v. Maunde* (6), *Walker v. Shore* (7), *Banks v. Scott* (8). In the case of a bankrupt, land converted in his lifetime is personal; if after death, the heir may treat the surplus as realty. In the case of a mortgage, with power of sale, it depends on the time of the sale: if during the life of the mortgagor, he or his executors, &c. take the surplus; if after his death, the heir takes it—*Wright v. Rose* (9). There is nothing in the proceedings in this court to alter the nature of the property. In *Jessopp v. Watson* (10), the testator directed a mixed fund, composed of the produce of his real and personal estate, to be applied to certain specific purposes, and the residue to be divided among his children or child at twenty-one if sons, and twenty-one or marriage if daughters; and if no child, to such person or persons as he should by his codicil appoint. The testator died without having made a codicil, leaving an only daughter his heir, who died under twenty-one and unmarried. It was held, that so much of the residuary fund as was constituted of real estate descended to the heir, but in the character of personal estate; and that such personal estate, together with the residuary personal estate of the testator, was, in the event which had happened, undisposed of and divisible under the Statute of Distributions. Seymour's willingness to submit was conditional, and, the condition failing, he may claim his right again. There has been no conversion into personalty. The Court may undoubtedly question the motives of the trustee in not selling, and determine whether the property is to be considered as real or personal estate; and should it determine that the property is real, another question may arise between Wm. Seymour and the Crown. The whole law on this subject is to be found in *Burgess v. Wheate* (11).

(5) 16 Ves. 27.

(6) 19 Ves. 423.

(7) 19 Ves. 387.

(8) 5 Madd. 493.

(9) 2 Sim. & Stu. 323.

(10) 1 Myl. & K. 665; s. c. 2 Law J. Rep. (N.S.) Chanc. 197.

(11) 1 Eden, 177. See also *In re Evans*, 2 Cr. M. & R. 200; s. c. 4 Law J. Rep. (N.S.) Exch. 201, and *The Attorney General v. Ramsay's Trustees*, 2 Cr. M. & R. 224, s. c. 4 Law J. Rep. (N.S.) Exch. 211.

Mr. Temple and *Mr. Sharpe*, for the parties entitled to the property if converted into personalty.—If under the terms of the will an absolute option was given, no doubt it would be as contended for on the other side; but here, no such option is given, otherwise he might keep the furniture in specie. The words in the last clause may refer to the option of all the legatees—*Deeth v. Hale* (12). If one of the legatees desires a sale, he cannot elect to take the lands as money. *Walker v. Denne* was a case of clear option to vest in freehold or leasehold. No option was exercised; it remained money. *Cole v. Wade* was also a case of absolute option. Neither of those cases applies here. The general principles, in regard to the question of conversion out and out, are best stated in *Smith v. Claxton* (13), *Kirkman v. Miles* (14), *Flanagan v. Flanagan* (15), *Mallabar v. Mallabar* (16), *Ackroyd v. Simpson*. If the direction be to sell, the purpose remains, and so the land is to be treated as money—*Wright v. Wright* (17). Then, with regard to discretion as to time—*Doughty v. Ball* (18). The question is, whether there is sufficient in this will to take it out of the rule, and whether the Court will not so construe it as not to make it discretionary, but to direct a sale absolutely. The bill was filed in 1820; a decree was made in 1822, by which it was referred to the Master to inquire whether it would be most for the benefit of the estate to sell, and if so, he was to proceed to a sale. The Court by this did not consider it as an absolute option; but it would not take on itself to state whether the proper time had arrived. The Master reported in 1824 that it should be sold. Polley, the original plaintiff, died in 1830. The decree for a sale was acted on in 1832, and a sale took place, but the purchaser not completing his purchase, the contract was rescinded. Circumstances arose after Polley's death, when the present plaintiff revived the suit, by which it was thought advisable to have a

(12) 2 Mol. 317.

(13) 4 Madd. 484.

(14) 13 Ves. 188.

(15) Cited in *Fletcher v. Ashburner*, 1 Bro. C.C. 497.

(16) Forest. 79.

(17) 16 Ves. 188.

(18) 2 P. Wms. 320.

further reference to the Master on the subject of a sale, and in 1836 he made another report, in which he altered his former opinion, and said, that from circumstances subsequently brought to his notice, he was of opinion that the Pantheon should not be sold. The present plaintiff confirmed the election of his ancestor, by wishing to have it converted into money. This, therefore, must be considered as a decree acted upon, and as coming within the rules of conversion.

Mr. Wray, for the Crown.—Looking at the nature of this property, the reasonable construction is to give an option as to time. The object is a division. The words are to be construed as meaning to give sound discretion to the trustee. If a sale was the object, there is an end of the case. Therefore this is a conversion out and out.

Mr. Stuart, in reply.—The case lies in a narrow compass. The bequest to the residuary legatees speaks of real and personal property. Nothing done in the court can affect the case. Here the words in the will do not go to an absolute conversion out and out.

Dec. 21, 1837.—*ALDERSON, B.*—In this case I have looked at the authorities, and examined with care the will of the testatrix Salime Turst. The only question is, whether the Pantheon, which is of freehold tenure, and the only property mentioned in her will, must be considered as converted into personal estate by the residuary clause. The principle upon which the Court is to proceed is quite clear. We are to examine the whole will, and to see whether the expressed intention of the testatrix, to be collected therefrom, was, that this property should be converted out and out, as it is called, or whether it was given to the trustee upon a trust, either to sell or not to sell, according as he, in his discretion, might judge best. The testatrix, after giving some trifling legacies, includes all her residuary property, real and personal, in one general devise. She devises it to a trustee, "upon trust to retain and keep the same in the state it shall be in at the time of my decease, as long as he shall think proper, or to sell and dispose of the whole or such part thereof as and when he or they shall

from time to time think expedient, either by public auction or private contract, and in such lots or parcels as he or they shall think best and most advisable, unto any person or persons who shall be willing to become the purchaser or purchasers thereof, or of any part thereof, for the most money and best price or prices that can or may, at the time or times of such sale or sales or disposition, be reasonably had or gotten for the same." Then she goes on to provide what shall be done with the residue, so to be dealt with at the option of the trustee. Now, on looking at this clause, it is to be observed, that the simple and natural meaning of the words is in favour of a discretion vested in the trustee; for he is, in the first place, to keep and retain the estate in the state it shall be in at her decease. Secondly, if he does not do that, he is to sell the whole or any part thereof, (which seems strongly to point to a discretionary power,) as he shall think expedient, and when he shall think expedient, and in such lots as he shall think best.

The will then provides, that the proceeds of what is sold, together with the personalty, shall be vested in the trustees' names, jointly with those of two of the residuary legatees, and gives the trustee the power of changing the stocks in which the money should be invested; but still confining such power to stocks of a similar description; and after providing, that out of the fund consisting both of rents, (of so much of the property as should remain actually unconverted,) and the then annual profits of the personal estate, and parts of the real estates converted, certain annuities should be paid, which, in case of insufficiency, were to abate proportionably,—gives the whole residuary fund to certain persons, amongst whom the trustee is included, in equal shares. This clause contains words applicable to the property both in its converted and unconverted state, and speaks of the respective heirs, as well as the personal representatives of the residuary legatees; in fact, directing that the residuary property in the hands of the trustees shall go to them, their heirs or executors, according to the different natures and qualities thereof. This, therefore, very materially increases the probability of the conclusion,

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that the testatrix intended the trustee to have a discretion; for she seems here to contemplate the probability that he would use it, and to have employed apt words to provide for such a contingency. There is an additional expression in the will, which leads to the same result. The testatrix, speaking of the trust, uses these words: "and for facilitating such sale and sales as are by me hereinbefore authorized to be made, of my real and personal estate," &c. The word "authorized" is more applicable to a discretionary power than to an order and direction on her part.

There are difficulties, no doubt, on the other side, but they rather arise out of the nature of the devise, being of portions of one general residuary fund, consisting of both real and personal estate, and of the double situation of Mr. Seymour, as trustee and one of the legatees, than out of the words of the will, as used by the testatrix. It is safer in such cases to be governed by the words of the will, and, if possible, to give to each and to all of them their natural and simple meaning. Indeed, I think, that the decision of Sir William Grant, in *Brown v. Bigg* (19), in words not very dissimilar, is almost in point; the words there were, "that the testator ordered and empowered his wife, in case she chose so to do, with the advice of W. R., to sell the Grimsden estates;" stating "she will probably not choose to live there." It was there contended, that it was a conversion out and out; but Sir W. Grant held the contrary, deciding, that it only became personal estate upon the sale by the widow, under the powers contained in the will.

That is, therefore, the view which I take of this will. It seems to me, that here the testatrix has bequeathed her real estate to the trustee, with a discretion to sell or not to sell the whole or any part of it; and, consequently, until he exercises that discretion, the property remains in the state it was at the time of her death.

Then, have the subsequent proceedings in this court made any difference? In 1822, the bill was filed. The trustee then submitted to act as directed by the Court.

(19) 7 Ves. 279.

After various references, the Court directed a sale, but no sale has taken place; and the last report of the Master is against any sale, it being in his judgment expedient for all parties, that the property should remain in its present state. I think, this leaves the case as it stood under the will.

Judgment accordingly.

C.B. }
Nov. 11. } MARTINEAU v. COX.

Partner—Liability.

A partner of a foreign house, carrying on business abroad, he residing and carrying on business in England, on his own account, is not bound to know the transactions of the foreign partnership, although they are binding on him, and, consequently, he will not be required to set forth a schedule of books, &c., relating to, and in the custody of, the foreign house.

The defendant carried on business as a merchant, on his own separate account, in London, where he resided, and where he had had various dealings with the plaintiff; but it was sought by this bill to charge him as a partner in a house in Portugal, with the value of certain bombazines, which the plaintiff, through the defendant, had consigned for sale to the Portuguese house. The bill charged, that there were in the possession or custody of the house in Portugal, various books of accounts, papers, writings, and memorandums, whereby the partnership between the defendant and that house would appear, and whereby certain dealings mentioned in the bill would be shewn to have been carried on between the plaintiff and the defendant, on the partnership account. The defendant, in his answer, admitted that he was a partner, to a certain extent, in the Portuguese house; but stated, that he could only set forth such books, &c. as concerned his separate dealings with the plaintiffs, and such as related to consignments which he had made for them to the Portuguese firm; but that he knew nothing of the books, accounts, and transactions of the Portuguese house, as a partnership.

Mr. Rogers, for the plaintiffs, objected to the answer, on the ground of insufficiency, contending, that the defendant being a partner, and thereby having the means of knowledge, and it not appearing that he had taken all the steps he might have taken to obtain the required information, his personal ignorance of the matters inquired after would not serve him in not answering. In *Neate v. the Duke of Marlborough* (1), Lord Abinger, C.B., laid it down, that if a bill state a fact not denied by the answer, by which it appears that the defendant had the means of making an inquiry, he must answer as to the result of his inquiry. The defendant, in this case, had the means of inquiry: the possession of one partner was the possession of the other; and he ought to set forth a schedule of these books, as he was bound to know the transactions of his own house.

LORD ABINGER, C.B.—I do not think this an analogous case with that of *Neate v. the Duke of Marlborough*. Situated as the defendant is, I do not consider that he is bound to write to his partners for these books. His partners are in another country, and he has no controul over their dealings and transactions. A man is not bound to know the affairs of a partnership in Portugal, or in India, in which he may happen to have a share. Their transactions, it is true, are binding on him; but he is not bound to know them. Suppose the defendant gave a schedule of these books, and the partners abroad refused to give them up, how could this Court enforce their production? The Court ought not to commence the exercise of a jurisdiction which it cannot ultimately enforce. I cannot make an order on a gentleman in Portugal.

Exception overruled.

C.B. }
Nov. 22. } LEWTHWAITE v. CLARKSON.

Practice.—Submission to Demurrers for want of Equity, and for want of Parties.

If a plaintiff give notice, within two days before the day on which a demurrer to his

(1) 2 Y. & C. 3; s. c. 5 Law J. Rep. (N.S.) Exch. Eq. 98.

bill for want of parties is set down for argument, of submitting to the demurrer, without a special application for the purpose he cannot amend his bill. Submitting to a demurrer for want of equity puts the bill out of court; nor can it, except under special circumstances, be restored.

A demurrer for want of parties had been filed by one of three defendants, of the name of Clarkson, the other two having filed a demurrer for want of equity. These demurrers were both set down for argument on the 2nd of November. On the 8th, briefs to argue these demurrers were delivered to the defendant's counsel. Notice was given on the 9th to the defendant's clerk in court, by the plaintiff's solicitor; that the plaintiff submitted to the several demurrers; and a further notice was shortly afterwards given, that the plaintiff's counsel had obtained an order to amend his bill, by adding parties or otherwise as he might be advised, upon payment of 30s. costs to the defendants, in respect of each of the demurrers.

A motion was now made, that the order to amend might be discharged, or that the plaintiff might pay the defendants the taxed costs of their demurrers.

Mr. Spence, in support of the motion.—Where the demurrer for want of parties has not been submitted to, at least two days before the day for argument, the bill cannot be amended as of course—1 *Fowl. Pr.* 320; and after being set down for argument, under any circumstances it can be amended only on payment of taxed costs—*Downes v. the East India Company* (1), and *Anonymous* (2). Then, as to the demurrer for want of equity, the plaintiff's submission, as against the parties so demurring, puts the bill out of court; and, consequently, the bill must be taken to be dismissed as against them, with full costs—*Kirkby's Orders*, p. 6.

Mr. Monro, contra.—A special application is necessary, in order to amend a bill after demurrer allowed for want of equity; but it is not so where the demurrer is only for want of parties; there, although it may

(1) 6 Ves. 586.

(2) 9 Ves. 221.

have been set down for argument, until it is actually argued, without special application, a plaintiff may amend. The plaintiff in this case, having obtained an order to amend as against all the defendants, the real and only question is, whether he shall pay 30s. or full costs; such appears to be the opinion of the defendants by the terms of their motion. It is in reality a question of costs.

LORD ABINGER, C.B.—If the demurrer for want of equity had been allowed, how could the plaintiff have proceeded upon his bill? It is clear, that he could not have amended a non-existing bill. The question, therefore, is, whether by submitting to the demurrer, he should be allowed an advantage which he otherwise would not have obtained; and it seems to me that, according to the strict practice of the Court, he ought not. If the matter had been originally brought to my notice, I should certainly not have allowed the amendments as a matter of course; at the same time, under the circumstances, I am desirous that the expense of the new bill should be saved. Therefore, upon payment of the costs of the demurrer for want of parties, and of this application, let the order stand for amending the bill for want of parties, and let the demurrer for want of equity be set down for argument.

Ordered accordingly.

ALDERSON, B. }	GRANT v. GRANT AND
Dec. 14. }	OTHERS.

Devise—Residuary Estate—Interest.

A residuary estate was bequeathed in the first instance to be paid into the hands of the legatee, on attaining the age of twenty-five years, and not till then, unless she married; the whole property then to be settled on her and her children:—Held, that under this bequest, the legatee, who was an infant at the death of the testatrix, was absolutely entitled on attaining the age of twenty-one, to the accumulation of interest which had accrued, during her minority.

Mary Hay, widow, by her will, dated the

13th of January 1827, after giving divers legacies to various persons, expressed herself as follows:—"And finally, I give and bequeath to my dear adopted child, Maria Hannay Grant, the sum of 5,000*l.*, the whole of my plate, jewels, and trinkets of whatsoever description, all my household furniture and property, whether real or personal, of whatsoever nature, to secure which, I hereby appoint her the sole residuary legatee to everything I die possessed of, except those legacies I have devised away in the former part of this my will and testament." And after certain other bequests and directions therein contained, the testatrix expressed herself as follows:—"I do hereby also constitute and appoint Mrs. Jane Grant, Mrs. Mary Hastings Hannay, Thomas Hogan Smith, Esq., and Mr. Thomas Anthony Fenton, joint executors of my whole property, and guardians and trustees of my adopted child, Mary Hannay Grant, whose property I should wish to be paid into her hands, on the day she attains her twenty-fifth year, and not till then, unless she marries; *her whole property* then to be settled upon her and her children, in the event of her husband's death before hers. But if there are no children, then either the whole or the largest part of her property, as shall seem best to her guardians, to be at her own free and uncontrouled disposal."

The testatrix died on the 24th of September 1827, and her will was proved by the defendants, three of the executors thereby appointed.

By the Master's report of the 3rd of July 1828, it appeared, that the annual income arising from the property undisposed of, after the debts and legacies were satisfied, and to which the plaintiff was entitled as residuary legatee, amounted to the sum of 560*l.* 18*s.* 4*d.*, and the allowance to the guardians for maintenance, by order of the Court of the 16th of July 1828, having been only 150*l.*, by an order of the 6th of August 1833, increased to 300*l.*, the plaintiff, who had attained the age of twenty-one, presented this petition, which, after stating, that the residuary estate of the testatrix had exceeded the amount of the allowance made for her maintenance and education during her minority, and had

accumulated for her benefit, and that she was entitled to a vested interest in it, and that the direction in the will contained for the settlement of her fortune, and for the postponement of payment thereof, until she attained the age of twenty-five years, applied only to the *corpus* of the property, and having attained her age of twenty-one, she was entitled to have the surplus income which had accrued during her minority paid over to her, and that the whole of the future income ought also to be paid to her; she prayed, that she might be declared entitled to the surplus income of the residuary estate of the testatrix, which had not been applied towards her maintenance and education during her minority, and the accumulations thereof; that it might be referred to the Master to ascertain such surplus income and the accumulations thereof; that it might be declared that she was also entitled to the whole of the income of the residuary estate of the testatrix, accrued or to accrue since she attained the age of twenty-one years, and that the same might be ascertained and paid to her, &c.

Mr. Simpkinson and Mr. James Russell supported the petition.

Mr. C. Beavan, for the executors, did not oppose it.

His LORDSHIP made the order as prayed.

ALDERSON, B. }
1836. } DAVIES v. THOMAS.
June 28; Dec. 12.

Marriage Articles—Notice.

A, by his will, devised an estate to trustees, upon trust to raise money upon it, by sale or mortgage, to discharge a particular debt, and apply the residue for the benefit of his children. The estate was purchased by B, of the surviving trustee (B's father), giving his collateral security for the payment of the purchase-money, beyond what was required to satisfy the debt, which he paid. Before the premises were actually conveyed to him, B. entered into marriage articles, covenanting to settle the property upon his intended wife and her issue. After the marriage and

the execution of the conveyance, a settlement was made in pursuance of the articles which recited this conveyance, and also referred to the will.

Held, that the settlement conveyed notice of the will, which was binding on the wife and children of B, although the articles were silent as to the will; consequently, that A's children were, as against the children of B, entitled to a lien on the amount of the purchase-money unpaid on the estate.

It is not sufficient for a party claiming to be a purchaser for a valuable consideration, without notice under a marriage contract, to prove that he had no notice at the time of the articles; he must shew that he had no notice at the time of the settlement.

John Davies, by his will, dated November the 11th, 1808, reciting that he had purchased certain hereditaments and premises after described, and to enable him to complete such purchase, he had borrowed from his brother, the defendant, David Davies, the sum of 911*l.*, gave and devised all his messuages, lands, and hereditaments, situate in the parish of Eglwysfach, in the county of Denbigh, to Abel Lloyd and Robert Kyffin, since deceased, to mortgage or sell, and pay the said sum of 911*l.* and interest thereon, and divide the produce of such sale, and also his personal estate, between his, the testator's wife and children, provided that if his wife should marry before all his children should attain twenty-one, (which she did,) she should derive no benefit under his will. The will contained a clause, that the trustees' receipts should be a sufficient discharge to the purchaser for the purchase-money, to be paid for the premises, and that the purchaser should not be bound to see to the application thereof. The testator appointed his wife and David Davies executors of his will. The testator died in January 1809, leaving several children. David Davies proved the will. In 1814, Abel Lloyd and Robert Kyffin contracted to sell the estate to John Lloyd, the son of Abel Lloyd, for the sum of 2,242*l.* 14*s.* 6*d.*, and he was let into possession. By articles, dated the 11th of August 1815, which was after the above-mentioned contract, for purchase by John Lloyd, but before the premises were

actually conveyed to him, Abel Lloyd and John Lloyd, in contemplation of a marriage which was shortly afterwards had between John Lloyd and Elizabeth Jones, an infant, covenanted that they would, within a year after the celebration of the marriage, convey the premises to the use of John Lloyd for his life, with remainder to trustees, to preserve the contingent remainders, with remainder to the use of trustees for the term of 500 years, for raising 1,000*l.* for portioning the younger children of the marriage, with remainder to the use of the first and other sons of the marriage in tail, with remainder to the use of the daughters in marriage in tail.

By indentures of lease and release, dated the 1st and 2nd of May 1817, to which David Davies, the executor, and Robert Davies, the eldest son of the testator, were parties, the premises were conveyed by Abel Lloyd to John Lloyd in fee. The sum of 2,242*l.* 14*s.* 6*d.* was expressed to be the consideration of that conveyance; but the only part of the purchase-money actually paid or settled in account, was the sum of 1,349*l.* 3*s.* 1*d.*, being the amount of the principal money and interest due to David Davies, in respect of the debt of 911*l.*, and the accumulation of interest thereon. The remainder of the purchase-money, amounting to 895*l.* 11*s.* 5*d.*, was never paid by John Lloyd, but, as a collateral security for that sum, he executed a bond to that amount to Abel Lloyd, who was then the surviving trustee. In that bond, which bore date the 2nd of May 1817, David Davies joined as a security.

By indentures of lease and release, and settlement, dated the 11th and 12th of August 1820, and executed after the marriage of John Lloyd, the premises in question were conveyed to trustees to uses, in pursuance of the articles. David Davies and Robert Davies were parties to that settlement.

In 1822, the younger children of the testator, John Davies, instituted a suit in this court, praying an account of the testator's personal estate, and of the rents, profits, and produce of his real estate, and that their respective shares in the residue might be paid or secured to them. In that suit, Abel Lloyd, David Davies, and

Robert Davies, were defendants; and in February 1826, it was amongst other things ordered and decreed, that the defendant, Abel Lloyd, should forthwith proceed to recover and get in the principal and interest due from John Lloyd, and the defendant David Davies, upon the bond of the 2nd of May 1817; and in case the defendant, Abel Lloyd, should not within three months from the date of that decree proceed to recover and get in the same, then it was ordered, that the plaintiffs should be at liberty to use the name of the defendant, Abel Lloyd, and to institute such proceedings in his name as they should be advised for the recovery thereof.

In September 1826, John Lloyd died intestate, leaving his widow (formerly Elizabeth Jones,) and two children him surviving. Upon this, the action directed by the decree to be brought against John Lloyd, was brought against his widow as his administratrix; but for default of assets of the intestate, nothing was recovered in the action. An action, as directed by the decree, was also brought against David Davies, but he took the benefit of the Insolvent Debtors Act, and nothing was recoverable from his estate.

In May 1828, Abel Lloyd died insolvent. The present bill, which was one of revivor and supplement, was filed for the purpose of establishing a lien claimed by the children of John Davies, upon his estate, to the amount of 895*l.* 11*s.* 5*d.*, the residue of the purchase-money due from John Lloyd. The plaintiffs were such of the children of John Davies as were infants at the time of the decree in the original suit. The defendants, in addition to those in the original bill, or their representatives, were the other children of John Davies, the infant children of John Lloyd, and the trustees under John Lloyd's marriage settlement. The bill charged, that when the marriage articles were entered into, John Lloyd had notice that his father, Abel Lloyd, had no title to the premises, other than as one of the trustees for sale under the will of the testator John Davies, and that he had no power to contract to settle the same; and that John Lloyd had also notice, that the children of the testator

were entitled to the surplus produce of the sale of the premises.

It appeared in support of the charge, that in the deed of release of the 2nd of May 1817, Abel Lloyd was described as "surviving devisee, in trust for sale under the will of the said John Davies;" and that this deed of release was recited in the subsequent indenture of settlement of the 12th of August 1820. It likewise appeared, that Messrs. John and Edward Oldfield, with full notice of the trusts of the will of John Davies, acted as the solicitors of Abel Lloyd and John Lloyd, in relation to this purchase, that they prepared the deeds of conveyance, and likewise prepared and were attesting witnesses to the bond; and that one of them, John Oldfield, was a trustee under the settlement. Mr. Edward Oldfield, in his examination, stated, that although a receipt for the whole purchase-money was indorsed on the deed of the 2nd of May 1817, he could not say that any portion of the same was, at the time of the execution of that deed, or at any other time, actually paid by John Lloyd to Abel Lloyd; and he believed that the sum of 895*l.* 11*s.* 5*d.*, for which John Lloyd's bond was given, was part of the money purporting by such indorsement to have been paid by John Lloyd.

Mr. Simpinson and *Mr. Koe*, for the plaintiffs.—The principal point is, whether there exists a lien on the estate, as claimed by the plaintiffs. It is no answer to this claim to say, that at the time of the contract there was no notice; for it will be sufficient to shew, that there was a constructive notice at the time of the conveyance. The purchase deed of May 1817, refers to the will of John Davies; that deed is virtually incorporated in the settlement by means of a recital; and, consequently, the parties deriving title under these deeds, must be deemed to have had constructive notice of the trusts for the testator's children. Besides, through the medium of their solicitors, they had notice of the non-payment of the part of the purchase-money secured by the bond. Such a collateral security cannot exonerate the estate. The lien remains until all the purchase-money is paid. Abel Lloyd was a mere devisee in trust, and might at any time have resorted

to the estate, and his *cestuis que trust* may work out their equities through him.

Mr. Ombler, for the defendants in the same interest with the plaintiff.

Mr. Duckworth, for the other defendants.

Mr. Temple and *Mr. Tennant*, for the trustees and infant children of John Lloyd.—The plaintiffs cannot, by a supplemental bill, raise the question relative to the existence of a lien, which point was decided before the Chief Baron in 1826. Had not the original decree been founded on the hypothesis that no lien existed, the estate would then have been declared liable to make up the portion of the purchase-money remaining unpaid. Without a rehearing, the Court cannot deviate from the line of equity then followed. But supposing there had been no decree, surely it cannot be contended, that notice to John Lloyd will bind the children. Had their mother or their guardian notice? They merely knew that part of the purchase-money remained unpaid, for which a security was taken. This security was approved of by the executor, who, together with the devisee in trust and the testator's heir-at-law, was a party to the deed of conveyance. Besides, by the will, the receipt of the trustees was a sufficient discharge to the purchaser, who was not bound to see to the application of the money.

[ALDERSON, B.—The purchaser was not bound to see to the application of the purchase-money; but here there was no receipt of the money.]

There was a receipt indorsed on the conveyance, which would be evidence in favour of all persons except John Lloyd, who is alone guilty of misrepresentation. The trustee, executor, and heir-at-law of the testator, are also parties to the marriage settlement, made in pursuance of a previous covenant to secure a jointure and provision for the wife and children. The only notice that can affect the children, is, that John Lloyd claimed to be owner of the estate. No fraud can be imputed to the wife or children, and they ought not to be held liable for the acts of the devisee in trust, against whom they have no remedy. The plaintiffs have no case at law, and why

should equity interfere? The trustees of the settlement obtained the legal estate in 1820, and are not affected by any notice previous to that time. Besides, a recital of the trusts of the will in the deed of conveyance and marriage settlement does, by no means imply notice, that the purchase-money remained unpaid.

Mr. Simpkinston replied.

Dec. 12.—*ALDERSON, B.*—The only question in this case is, whether the plaintiffs are entitled to claim a lien on the estate of the late John Davies, to the amount of 895*l.* 11*s.* 5*d.* The estate belonged originally to John Davies, by whose will it was devised to Abel Lloyd and Robert Kyffin, in trust to raise, by mortgage or sale, the amount due to David Davies, and, if sold, to divide the residue, after David Davies's debt was paid, between the testator's children. Under this power, the estate was bargained to be sold by Abel Lloyd and Robert Kyffin to Hugh Hughes, as agent to John Lloyd, for the sum of 2,242*l.* 14*s.* 6*d.*; and afterwards, in 1817, by a deed of release, which recited the will of John Davies, the amount of the debt with interest then due to David Davies, and all the other material facts, the estate in question was conveyed to Abel Lloyd, therein described as the surviving devisee for sale under the will of John Davies, to John Lloyd and his trustees. In point of fact, the whole purchase-money was not paid, but only the debt due to David Davies, and a portion of the residue, the whole of which was divisible amongst the children of John Davies under his will. The remainder, being the sum of 895*l.* 11*s.* 5*d.*, was secured by the joint bond of John Lloyd and David Davies. Now, for this amount, there was clearly at that time a lien on the estate sold.

John Lloyd, as a party to this transaction, had, of course, full knowledge of the will of John Davies, and of this breach of trust, in leaving a part of the purchase-money thus unpaid; and if the defendants are volunteers claiming under him, they will be in the same situation in which he would have been. As to him, it is not

doubted that the plaintiffs would be entitled to the lien on the estate now claimed by them.

But the case of the defendants is twofold. First, they say that this question has already been decided by this Court. I think, however, that this was not so; neither John Lloyd nor his descendants were then parties to the suit, and this point could not properly have come before this Court; this, therefore, is not a good defence. But, then, secondly, it was urged, that the children of John Lloyd are purchasers for valuable consideration, and without notice; therefore, are entitled to the judgment of the Court. This marriage, it may be admitted, was a valuable consideration; and if the marriage took place, and the settlement was made without notice of the will of John Davies, and of the money not having been paid, the case would be different. I delayed my judgment on this point till I could examine the deeds.

The articles, previous to the marriage, are dated in 1815, and by them there is an engagement to convey these estates to certain uses therein stated: no notice is there taken of John Davies's will. At that time there had been no conveyance, nor any money paid for the estate in question, nor the bond given for the residue; this took place subsequently in 1817.

The settlement itself was executed in 1820, and after the marriage. It is true, that this, being in pursuance of previous articles, could not be voluntary. But here, in the settlement itself, there was, I think, sufficient notice; for the will of John Davies is distinctly referred to in it, and that ought to have led the parties to make the requisite inquiries; and if that had been done, they would have found that there was a lien on the estate for the residue of the purchase-money. This, therefore, is equivalent to notice; and this second defence also fails. The decree must, therefore, contain a declaration as claimed by the plaintiff of the existence of the lien. This was the only point in dispute argued before me.

Decree accordingly.

ALDERSON, B. }
 July 1, 1827. } BOWEN v. SCOWCROFT.
 Dec. 1, 1837. }

Devise—Estate for Life.

The rule established in numerous cases, that a bequest to A, and in case of his death to B, gives A an absolute interest in case he survives the testator, is not to be extended to devises of real estate.

Accordingly, upon a devise of a certain share of a real estate to the testator's sisters, Mary and Lucy, share and share alike; "and in case of their demise," to be equally divided amongst their children, or their lawful heirs:—Held, that the sisters took estates for life only, with remainder to their children as tenants in common in fee.

Capt. William Bowen, late of the 59th regiment, by his will dated the 4th of Nov. 1810, devised to his two brothers, Arthur and Peregrine, one-third part each, share and share alike, of certain lands and premises in Prendergast and Ambleston, in the county of Pembroke, to which he was entitled in remainder on the death of his father, William Bowen, sen., who had a life interest in them: the other remaining third part he devised to his two sisters, Mary Allen and Lucy Bowen, share and share alike, making a sixth part to each; and, in case of their demise, he willed, and bequeathed, and devised their respective shares or proportions to be equally divided among their children or their lawful heirs, observing, first, that his father was entitled to raise the sum of 2,000*l.* sterling, by mortgage or otherwise, according to a bond or deed executed by testator to his father on the 15th of April 1802, for that purpose. He also bequeathed to his father 10*l.* sterling, to purchase a mourning ring, or any other token of remembrance. He further bequeathed to Mary Bradshaw, 500 star pagodas, or 200*l.* sterling, lately deposited by him with agents at Madras; and to his brother Peregrine, all the personal property of which he might die possessed, as well as any prize money to which he might thereafter be entitled, by the capture of the Isle of France and its dependencies. And he appointed as his executors, Lieut. Richard Lenton and Paymaster Hickman Rose, of his Majesty's 59th regiment.

NEW SERIES, VII.—EXCHQ. IN EQ.

Soon after the date and execution of his will, the testator, who had never been married, died, leaving Arthur, his elder brother and heir-at-law, Peregrine, his other brother, and two sisters, Lucy Bowen and Mary Allen, then a widow, and since deceased, him surviving.

Mary Allen afterwards married James Scowcroft, and died, leaving three children by her first husband and five by her second. During the lifetime of William Bowen, the father, the tenant for life, but after the death of the testator, Scowcroft and his wife levied a fine *sur consance de droit tantum*, of her share in the estates under the will, but no uses were then declared of the fine. Soon afterwards, the tenant for life died, when Scowcroft and his wife entered into the receipt of the rents and profits of Mrs. Scowcroft, one-sixth share of the devised estates. Mrs. Scowcroft died, having previously executed a short deed, declaring the uses of the fine levied by her to be to her husband and her brother Peregrine in fee. Although it was not expressed by deed, yet it was the intention of the parties, that this share should be sold, and the proceeds divided among her children. Under this state of circumstances, Arthur, Peregrine, and Lucy Bowen filed a bill of partition against their sister, Mrs. Scowcroft's husband and children, and against Richard Mathias and Thomas Gwynne, the assignees of the share of Arthur Bowen, for the payment of his debts.

In July 1835, by a decree of the Court, a reference was made to the Master to inquire and report what children of Mary Scowcroft were living when the testator died—when any were born of her subsequent to his decease—whether any and which of them had since died, and if so, whether any and which of them who had died, died intestate or not, and who were the heirs-at-law or devisees of such of them who had since died; and if the Master should find that all the children of Mary Scowcroft who were then living, or the heirs or devisees of such of them who were then dead, were parties to the suit, then the Master was to inquire and report what shares and interest they, or any or either of them, were respectively entitled to in the hereditaments.

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By his report, the Master certified that the plaintiff, Arthur Bowen, by the will of the testator, or as the heir-at-law of the testator, or partly by such will and partly as such heir-at-law, became seised of or entitled to one-third part or share of and in the said hereditaments in fee simple: and by the said will, or as such heir-at-law, he also became seised of or entitled to an estate of inheritance in reversion, immediately expectant upon the decease, or other sooner determination of the estate for life therein of the plaintiff, Peregrine Bowen, of and in another third part or share of and in the same hereditaments: and that such two-third parts or shares of and in the said hereditaments, were then vested in the said defendants, Richard Mathias and Thomas Gwynne, upon the trusts of the indenture of release of the 12th of February 1833, in the report mentioned. And the Master found, that the testator, by his said will, devised one-third part or share of and in the said hereditaments to the plaintiff, Peregrine Bowen, for his life; and that the plaintiff, Peregrine Bowen, was seised of or entitled to such third part or share of and in the said hereditaments, for his life. And the Master found, that the said testator, by his will, devised one-sixth part or share of and in the said hereditaments, to the said Mary Scowcroft, formerly Mary Allen, for her life, and after her decease, the said testator devised such sixth part or share of and in the said hereditaments, to all the children of the said Mary Scowcroft, in equal shares, as tenants in common in fee simple; and that the defendants, Charles Bowen Allen, John Allen, Peregrine Shaw Allen, James Scowcroft the younger, William Bowen Scowcroft, Martha Elizabeth Scowcroft, and Hugh Arthur Fender Scowcroft, were seised of or entitled to such last-mentioned sixth part or share of and in the said hereditaments as tenants in common in fee simple, in the following shares, that is to say, the said Charles Bowen Allen, to three-tenth shares of such last-mentioned sixth part or share, and the defendants, John Allen, Peregrine Shaw Allen, William Bowen Scowcroft, Martha Elizabeth Scowcroft, and Hugh Arthur Fender Scowcroft, to the remaining five-tenth shares of such last-mentioned sixth part or share in equal

shares; and the Master found, that the said testator, by his will, devised one other sixth part or share of and in the said hereditaments, to all the children of the said Lucy Bowen, in equal shares, as tenants in common in fee simple; and that the said Lucy Bowen was then seised of or entitled to such last-mentioned sixth part or share of and in the said hereditaments for her life, with remainder in fee simple to her children, if she should have any, in equal shares as tenants in common; that the said Lucy Bowen had never married; and that the remainder in fee simple of and in the said last-mentioned sixth part or share of and in the said hereditaments, on the decease of the said Lucy Bowen, was undisposed of, in the event of the said Lucy Bowen not having any child, and that the same, in that event, would descend to the plaintiff, Arthur Bowen, as the heir-at-law of the said testator; and that the interest which would so descend to the said Arthur Bowen, passed by the said conveyance to the said defendants, Richard Mathias and Thomas Gwynne, upon the trusts declared thereof.

Exceptions were taken to this report by James Scowcroft, the father, on the ground, that the Master ought to have found that Mary Scowcroft took and became entitled to an estate in fee simple, or an estate tail, of and in one equal sixth part of the hereditaments; and that, by means of the fine levied by the exceptant and the said Mary Scowcroft, his then wife, at the Spring Great Sessions in 1825; and by means of an indenture of the 1st of September 1825, the said last-mentioned sixth part of the said hereditaments, became and was then vested in the exceptant and the plaintiff, Peregrine Bowen, as joint tenants for an estate in fee simple, or for a base fee, determinable on the failure of issue, inheritable under such estate tail.

Two exceptions to the Master's report were also taken by the defendants, the younger children of Mary Scowcroft. First, that he ought to have found that the defendants, Charles Bowen Allen, Peregrine Shaw Allen, James Scowcroft the younger, William Bowen Scowcroft, Martha Elizabeth Scowcroft, and Hugh Arthur Fender Scowcroft, were then seised of or entitled to the one-sixth part or share of

and in the said hereditaments devised to Mary Scowcroft, as tenants in common in fee simple in the following shares: that is to say, the said Charles Bowen Allen to one-eighth part or share of such last-mentioned sixth part; the said James Scowcroft the younger, to two-eighth parts or shares of such last-mentioned sixth part; and the defendants, John Arthur Allen, Peregrine Shaw Allen, William Bowen Scowcroft, Martha Elizabeth Scowcroft, and Hugh Arthur Fender Scowcroft, to the remaining five-eighth parts or shares of such last-mentioned sixth part or share, in equal shares. And secondly, that he ought to have found, that the sixth part or share devised by the will to the plaintiff, Lucy Bowen, was subject to a cross-remainder, or an executory devise or limitation in the nature of a cross-remainder, on the decease of Lucy Bowen; and in the event of her not having any child, to or in favour of the persons to whom the other sixth part of the hereditaments were given by the will; and that the exceptants and Charles Bowen Allen and Peregrine Shaw Allen were in that event entitled, or in that event would be entitled, to the same or the like shares and interest of and in the last-mentioned sixth part or share originally devised to Mary Scowcroft, formerly Mary Allen, and her children.

Mr. Hodgson, in support of the exception taken by James Scowcroft the elder.—All the brothers and sisters of the testator having survived him are entitled, under the terms of the will, to absolute estates in fee—*Turner v. Moor* (1), *Cambridge v. Rous* (2). However ambiguous the words “in case of their demise” may appear to be, yet, they must here be taken to mean their death before some particular event, such as the death of the testator himself. In *Ommaney v. Bevan* (3), *Slade v. Milner* (4), *Chalmers v. Storil* (5), *Doe v. Prigg* (6), *Clayton v. Lowe* (7), and *Wright v. Stevens* (8), this principle prevails, that

where the language of the testator imports a contingency, it is referred to the testator's death. Having satisfied the Court that the testator intended to give the fee away from the heir, it is immaterial how it is moulded by the subsequent limitations. As all the brothers and sisters survived, they would, supposing the fee to pass, then take in fee: and the argument would be the same, should the Court think the principle not applicable to the brothers, but only to the two sisters. Peregrine and Lucy, being unmarried, perhaps might be held to take estates tail, if the principle extended to all four, whilst Mary, being unmarried, might be considered to take an estate for life only, with remainder to her children in fee—*Wild's case* (9). In *Oates v. Jackson* (10), it was held, that on a devise to A. and his children, if A. had children, the devise created a joint tenancy in fee in all of them. Yet it may be said that, in *Jeffery v. Honynwood* (11), it was held differently by Sir John Leach. It may be contended also on another ground, that Peregrine took an estate in fee. The testator gave to his two brothers, Arthur and Peregrine, “one-third part each, share and share alike.” Arthur was the heir-at-law; and the true construction of the meaning of the testator is, that he devised to both as tenants in common in fee; for the heir necessarily takes the fee. Although the words “share and share alike” were held, in *Dickins v. Marshal* (12), to create a joint tenancy, yet the law now is different. There is a distinction between this case and that of *Nowlan v. Nelligan* (13).

Mr. Spence and *Mr. John Evans*, for Charles Bowen Allen, the eldest child of Mary Allen, afterwards Scowcroft, and one of the defendants.—The cases cited in support of the argument, that Mary Scowcroft took a larger estate than that found by the Master, apply only to personal estate. *Turner v. Moor*, *Cambridge v. Rous*, *Lowfield v. Stoneham* (14), *Hinckley v. Simmons* (15), *King v. Taylor* (16), and other cases

(1) 6 Ves. 557.

(2) 8 Ves. 12.

(3) 18 Ves. 291.

(4) 4 Madd. 144.

(5) 2 Ves. & Bea. 222.

(6) 8 B. & C. 231; s. c. 6 Law J. Rep. K.B. 296.

(7) 5 B. & Ald. 636.

(8) 4 B. & Ald. 574.

(9) 6 Co. 17.

(10) 2 Str. 1172.

(11) 4 Madd. 398.

(12) Cro. Elis. 330.

(13) 1 Bro. C.C. 489.

(14) 2 Str. 1261.

(15) 4 Ves. 160.

(16) 5 Ves. 186.

referred to in 2 *Jarman's Powell on Devises*, 764, are all cases of legacies of personal estate. An indefinite devise of real estate, without words of limitation, carries only an estate for life. *Fortescue v. Abbott* (17) was the last case favouring a contrary construction, but there it was not disputed that the devise was of an estate for life only; but whether it was a vested or a contingent remainder, was the question there. In *Chalmers v. Storil*, the decision applied only to personal estate, although there was a mixed devise of real and personal estate. In *Doe v. Prigg*, it was not attempted to convert an estate for life into an estate in fee—it was on the word “surviving,” that the decision turned. The devise in *Clayton v. Lowe*, was not indefinite.

Mr. James Russell and *Mr. Hindes*, for some of Mary Scowcroft's younger children, contended, that Mary Scowcroft took an estate for life, with remainder to all her children as a class, in fee—*Billings v. Sandon* (18). As to the distinction between devises of real estate and bequests of personal estate, *Jeffery v. Honywood* and the other cases were referred to.

Mr. Elderton, for a younger child, contended, that such of Mary Scowcroft's children as were living at the death of the testator, took a vested remainder in fee after her life estate ceased.

Mr. Campbell, for the defendants Mathias and Gwynne, the trustees of the plaintiff, Arthur Bowen, the heir-at-law.—The rule, as stated by 1 *Roper on Legacies*, 524, 3rd edit., and to be gathered from all the cases, appears to be, that where, from the general context of the will, it may be collected that the testator in using the terms “in case of death” of a legatee, intended that the legacy should go over upon his decease, whenever it might happen, then the words denoting a contingency should be rejected, and a vested interest presumed. In *Slade v. Milner* (19), there was an immediate indefinite gift. In *Turner v. Moor*, it was clearly alternative. In *Lord Douglas v. Chalmers* (20), the bequest was to A, and in case of her decease to her children, share and share alike; and

it was held to be a life interest only in A, the capital to her children after her decease. The devise to the two brothers is unconnected with, and in a distinct sentence from that to the two sisters, and in different words; therefore, the argument on the words, “in case of their demise,” as referring to all the brothers and sisters, and as putting them on an equality, will not apply: it can only refer to the two sisters. *Wild's case* differs entirely from this: there the devise was to A. and his children, or issue; here, it is “to the children and their heirs.” In *Ives v. Legge* (21), this distinction was taken, and in *Jeffery v. Honywood*, the same principle was acted upon. Then it has been contended, that as the devise is of one-third part each, share and share alike, and as Arthur takes an estate in fee, Peregrine takes an estate in fee also; but before that conclusion can be arrived at, it must be shewn that Arthur as heir-at-law takes the fee. The testator never expected the uniting of the fee in Arthur, as heir-at-law, with the estate for life, which he had devised to him. The Court, in *Goodtitle v. Edmonds* (22), excluded the construction attempted here upon the words “share and share alike;” and *Dickens v. Marshal* also excludes that construction. There, the question was, whether the devisees, one of whom was, as now, also the heir-at-law, took as joint tenants or as tenants in common; and it was held, that they took estates for life. In *Pettywood v. Cook* (23), there was a devise of three houses to the testator's wife for life, with remainder as to one house, to each of the children of the testator in fee, and with a clause, that if any of them should die without issue, the survivors should enjoy *totam illam partem* equally between them: it was held, that, under these words, the survivors took only an estate for life.

Mr. Hodgson replied.

Dec. 1, 1837.—ALDERSON, B.—In this case I have considered the will of the testator, and the points submitted in the argument to me.

The testator, by his will, bequeaths to his brothers, Arthur (his heir-at-law) and

(17) Pollexfen, 479; s. c. Fear. Cont. Rem. 243.

(18) 1 Bro. C.C. 393.

(19) 4 Madd. 144.

(20) 2 Ves. jun. 501.

(21) Fear. Cont. Rem. 377.

(22) 7 Term Rep. 635.

(23) 1 Cro. Eliz. 52.

Peregrine, one third part each, share and share alike, of the lands and premises in Prendergast and Ambleston; and the other remaining third part of the said lands to his sisters Mary and Lucy, share and share alike, making a sixth part to each of them; and then he adds, "in case of their demise, I will and bequeath their respective shares or proportions to be equally divided amongst their children or their lawful heirs." In the latter part of his will, he also bequeaths the whole of his personal estate, subject to his legacies, to his brother Peregrine.

Now, on this will several questions have been made; but I do not propose to consider them in the order in which they were made, because a more simple course seems to me to be, to state the view I take of the will.

In the first place, it seems to me that the words, "in case of their demise," are applicable only to the devise to the two sisters, and have no reference to the previous devise to Arthur and Peregrine. The consequence is, that the question as to Peregrine depends, in my judgment, on the first devise alone; and there being no words of inheritance, I think he only took an estate for life. The words "share and share alike," in a devise to him jointly with the heir-at-law, were relied on. But I think these words insufficient. There were similar words in both the cases of *Doe v. Edmonds* and *Dickins v. Marshal*, but they were held insufficient: and, in this case, the testator, in the subsequent devise, construes these very words by the words, "making one-sixth part," which have reference only to the extent of land given, and not to the quantity of estate. It is said, that the intention must have been to leave both brothers equal interests. That may be so; but I cannot act upon a mere conjecture, which, even as a conjecture, is shaken by the subsequent devise of the whole of the personalty to Peregrine alone, which, for aught I can tell, may have been the way in which the testator intended the equality to arise. I think, therefore, that Peregrine took an estate for life in one third part.

Secondly, as to the estates given to the sisters. It was conceded by all in argument, that here the word "or" must be

read as "and," and rightly, for otherwise, the word "equally" could not have its full effect. The first question however is, what meaning is to be given to the words, "in case of their demise"? Mr. Hodgson contended, that these words mean, in case of their demise before the time of my decease, —thereby making the devise to the children and their heirs, a substitution for the devise to the parents; and if so, there is good ground, no doubt, for contending, that the intention was to give to the parents, as well as to the children, a fee simple. Many cases to this effect were cited; but they were all cases of personal property; and no case has been, or I believe can be, cited, in which such a construction has been applied to a devise of land. There is an obvious distinction between the two. A devise of a personal estate to A. B. gives him the whole interest. A devise of land to A. B. gives him only a life estate. In the former case, therefore, the words, "in case of their demise" preceding a devise over, cannot well have their proper effect, except by considering them as applicable to a devise over, as a substitution for the previous gift, in case the party to whom it is given should not survive the testator. But in the case of land, the most natural meaning of the words (which seems to me to be, "after their demise,") may very reasonably have its full effect. In reading this will, therefore, I think I ought to give that meaning to the words used by the testator; and then there is no doubt that the Master is right in coming to the conclusion, that Mary Allen took an estate for life in one-sixth, with remainder to her children in fee, as tenants in common; and that, in the events which have happened, Charles B. Allen is entitled to three-tenths thereof, James Scowcroft, jun. to two-tenths, and the other children to one-tenth each.

Lastly, as to Lucy Bower's share. It was further contended as to this, that she took an estate tail, having no children at the time of the testator's death. But I think this is not so; and that it is distinguishable from *Wild's case*, on the same grounds as were taken by Sir John Leach, in *Jeffery v. Honywood*. Indeed, on this part of the case, *Jeffery v. Honywood* seems precisely in point.

I think, therefore, that on this part of the case also, the Master has drawn a right conclusion from the will.

All the exceptions, therefore, must be overruled.

Ordered accordingly.

ALDERSON, B. } THORPE AND OTHERS v.
Dec. 11, 1837. } GARTSIDE AND OTHERS.

Mortgage—Sale—Trustee.

A testator had deposited the title deeds of an estate, for securing certain monies, and had entered into a written agreement to execute a mortgage deed when required. On a bill by the equitable mortgagees, the Court directed the estate to be sold, in default of payment by the testator's representatives, within six months of the Master's report.

The testator, William Gartside, kept a banking account with the Northern and Central Bank of England, who made to him various advances of money, as a security for which he lodged with them certain title deeds relating to property of which he was possessed, he, at the same time, entering into written agreements to execute mortgage deeds, if so required. He died in January 1836, without having executed such deeds, at which time the balance claimed by the bank as being due to them was 2,484*l.* 11*s.* 6*d.*, to obtain payment of which this bill was filed by the plaintiffs, on behalf of the directors of the company, against the defendants, who were the devisees in trust, the executors, and the parties beneficially interested under the will of the testator; and it prayed that certain of his real estates might stand charged as a security for the payment of the money, and that an account might be taken of what was due to them for principal, interest, and costs, and that it might be paid to them, or that the property might be sold, and the amount found due paid out of the proceeds; and that, in the event of a sale, the defendants and all proper parties might be ordered to join in a conveyance of the property to the purchasers, to deliver up the deeds, &c. relating thereto, &c., and that in the meantime a

receiver might be appointed, and the defendants restrained from receiving the rents, &c.

Mr. Simplinson and Mr. Bacon, for the plaintiffs, contended, that the plaintiffs were entitled to an immediate sale—*Brocklehurst v. Jessop* (1).

Mr. G. Richards and Mr. Milne, contra. This is a bill against equitable mortgagees, where the Court will allow six months from the date of the report for the parties to redeem—*Parker v. Housefield* (2), and *Mellor v. Woods* (3). The case cited on the other side is not applicable here.

Mr. Burgess, for two other defendants.

The Court referred it to the Master, to take an account of what was due to the plaintiffs for principal, interest, and costs; and decreed for a sale of the estate, as in *Parker v. Housefield*, in default of payment by his representatives within six months after the date of the report.

ALDERSON, B. } WILKINSON v. TORKINGTON
Dec. 13. } AND OTHERS.

Specific Performance—Lapse of Time.

Where the plaintiff, at the time of the commencement of the suit, is entitled to specific performance of an agreement for a lease, and to substantial relief, he will be entitled, at the hearing, to a decree for substantial relief, although the term of the lease has expired, if, in the meantime, there has been no act of the parties to take away this right.

The bill stated, that the Rev. Thomas Chambers Wilkinson, as rector of the united parishes of All Saints and St. Peter's, in the borough of Stamford, by his agent, William Banks, entered into a written agreement with James Torkington, Thomas Pilkington (since deceased), Thomas Edward Pawlett, William Roberts, John Smith, and Richard Scholes (also since deceased), to let to them all the tithes,

(1) 7 Sim. 438.

(2) 2 Myl. & K. 419; s. o. 4 Law J. Rep. (N.S.) Chanc. 37.

(3) 1 Keen, 16; s. c. 5 Law J. Rep. (N.S.) Chanc. 109.

both great and small, &c., of the rectory, at the annual rent of 370*l.*, for the term of nine years, from the 5th of April 1828, which agreement was dated the 16th of May 1828, and signed by W. Banks, as the agent of Mr. Wilkinson, and by the other parties to it.

Under this agreement the above parties entered into possession, and received the tithes, &c., until the deaths of Pilkington and Scholes, when the survivors continued in the receipt thereof.

In the year 1829, in consequence of a difficulty in getting in the small tithes, Mr. Wilkinson authorized his solicitor to allow an annual deduction of 30*l.* from the rent. On the 11th of October 1832, Torkington, acting for himself and the other lessees, on sending in, as usual, to the solicitor of Mr. Wilkinson, his account of the tithes for the year, applied for a further annual deduction, which was refused.

All the accounts relating to the tithes were settled up to the 5th of April 1831, and up to the deaths of Pilkington and Scholes; but what accrued due on the 5th of April 1832, and since, it was alleged, had not been paid.

In July 1834, Mr. Wilkinson brought an action in the Court of King's Bench, against the present defendants, Torkington, Pawlett, Roberts, and Smith, upon the agreement, to recover the arrears. They pleaded to the action, amongst other matters, that the agreement was not sealed, and consequently was void at law. On this ground the action was abandoned; and a bill was filed on the 2nd of February 1836, by Mr. Wilkinson, against those parties, in this court, for a specific performance of the agreement, for an account, and for payment of what might be found due to the plaintiff.

To this bill the several defendants appeared, and put in their joint answers, acknowledging the agreement, and stating, that since the year 1831, in consequence of the low price of corn, and general depressed state of the agricultural interest, the tithes had decreased considerably in value, below the amount fixed by the agreement, after the deduction of 30*l.*; and that they had made payments on account of the rector to a considerable amount in respect of the rent, &c.

Mr. Wilkinson having died on the 30th of November 1836, the suit was revived by his legal personal representative, Robert Porrett, jun., the present plaintiff, on the 5th of January 1837.

Mr. Simpkinson and *Mr. Ellison*, for the plaintiff.—It will be insisted by the defendants, that this is not a case for a specific performance, because the term, for which the agreement for the lease was granted, has now expired. Now, there is no proposition more clear than this, that in a case where the Court would originally have jurisdiction to decree a specific performance, and if, at the hearing, any portion of the agreement remained unperformed, and lapse of time has not taken away any of the grounds for relief, the Court will enforce a specific performance of it. So far has the Court gone, that even where the subject has been destroyed by the act of God, the Court has decreed a specific performance. In the case of *Cass v. Rudele* (1), the Court of Chancery decreed a specific performance of an agreement to purchase certain houses at Port Royal, in Jamaica, after those houses had been destroyed by an earthquake. In *Paine v. Meller* (2) there was a decree for the specific performance of a contract for the purchase of houses which had been burnt down antecedent to the decree. In *Mortimer v. Capper* (3) there was a similar decree, where there had been a sale of certain premises, the consideration for which was to be partly money, and partly an annuity to the vendor, who died antecedent to the decree. So also in *Jackson v. Lever* (4), where there was a contract that the one party should convey an estate, and the other should grant an annuity, although the vendor died previous to any payment of the annuity. These and various other cases were all cited and commented on by Sir John Leach, when Vice Chancellor, in *Kenny v. Wexham* (5), which goes to the full length of this, for there, although the annuity had expired by the death of the annuitant, the decree was for a specific performance. The circum-

(1) 2 Vern. 280.

(2) 6 Ves. 349.

(3) 1 Bro. C.C. 156.

(4) 3 Bro. C.C. 504.

(5) 6 Madd. 355.

stance of the lease here having expired, cannot alter the nature of the case. *Nesbit v. Meyer* (6) cannot affect this case; for there, the ground on which the Court refused to decree a specific performance, was out of mercy to the plaintiff.

Mr. H. Twiss and *Mr. Hayter*, for the defendants.—The course of decisions is in concurrence with that of *Nesbit v. Meyer*, which is a strong authority for the defendants, and totally different in its principle from those cited for the plaintiff. Those were cases of accident, which is entirely different from an efflux of time. Here it was competent for the party, but for his own laches, to have come for relief before the time had elapsed. He knew when his lease would expire, but he neglected to do so. In *Western v. Pim* (7), when the bill was filed, there was ground for a specific performance of the contract; but the plaintiff having, after answer, given notice to quit, according to a proviso for determining the lease, the bill was dismissed. So that if a person, on filing his bill, is in a situation to have a specific performance of a contract, yet there may afterwards be circumstances, such as delay, which may disentitle him to relief. *Hoyle v. Livesey* (8) shews, that after a cause is set down for hearing, it may be advanced at the discretion of the Court; but there having been no such application, the Master of the Rolls considered, that the expiration of the term was an answer to the bill. Here there has been delay. In *Watson v. Reid* (9), the plaintiff, the vendor, having notice from the purchaser that the latter abandoned his contract, did not file his bill for specific performance till about a year afterwards, and the bill was dismissed on the ground of unreasonable delay. So in *Heapy v. Hill* (10). Here it was not until two years and a half had elapsed after the payments had ceased, that an action of debt was brought upon this agreement; and finding that it was not maintainable after five years a bill was filed in a court of equity. To sustain a bill for an account there must be mu-

tual demands—*Dimwiddie v. Bailey* (11). Since the case of *Hoyle v. Livesey*, applications are frequently made to advance causes, on the ground that, if delayed, the parties will lose the benefit they seek by the suit. This is an application to an extraordinary jurisdiction; but the lapse of time is such as to preclude the party from relief.

ALDERSON, B.—It appears to me, that the plaintiff is entitled to a decree. The question, I take to be this—viz. whether, at the time this suit was commenced, there was a proper claim for a specific performance, coupled with a substantial right in the matter at issue between the parties; and whether there has been any subsequent act of the parties, or such a lapse of time, as to take away the substantial right to the relief which the plaintiff prays? It appears to me, that if the plaintiff was entitled to relief when he first came into court, the lapse of time since has not been such as to prevent the Court from granting that substantial relief. The cases cited appear to me to be perfectly distinguishable on this ground. In the case of *Western v. Pim*, the party having come into court, by his own act, in an intermediate stage of the case, took away from the Court the power of granting him any substantial relief at all. All the substantial relief to which he was entitled when he came into court, he, by his own intermediate act, prevented the Court from adjudicating upon. Now, I cannot say here, that the plaintiff, since he came into court, has done that which makes the relief he prays a matter no longer to be adjudicated upon. In the case of *Nesbit v. Meyer*, the Master of the Rolls proceeded upon the same principle, viz. that the lapse of time which had occurred since the parties had come into court, had taken away from the plaintiff every possible right to relief of a substantial nature in the matter at issue between the two contending parties. At the time when the plaintiff in this cause came into court, he had some right; and it is necessary for the Court now to see whether the lapse of time which has occurred has taken away that right, and

(6) 1 Swans. 223; s. c. 1 Wils. 97.

(7) 3 Ves. & Bea. 197.

(8) 1 Mer. 582.

(9) 1 Russ. & Myl. 236.

(10) 2 Sim. & Stu. 29.

(11) 6 Ves. 141.

that nothing is left for substantial relief in a court of equity. Here, at the time when the plaintiff came into court, he was entitled to a specific performance of the agreement, the term of the lease not having then expired; and he was entitled also to an account of the sums of money which were due from one party to the other on the footing of the performance of the agreement. It is true, that lapse of time has taken away the necessity of granting the lease, but it has not taken away the substantial part of the relief prayed, consequent on an account of the sum of money to which the plaintiff was entitled when he came into court.

Seeing, therefore, that the plaintiff was entitled to a specific performance of the agreement when he came into court, and seeing that he was entitled to substantial relief, and finding that lapse of time had taken away none of the grounds for substantial relief, it appears to me, on the present occasion, that the plaintiff is entitled to a decree in his favour, with costs.

Decree accordingly.

ALDERSON, B. }
May 9, 24, 1837. } GOULBURN v. BROOKS.

Legacy—where vested.

*A testator devised his real estate to executors, in trust, that his wife should receive the rents for the maintenance of his son and daughter till twenty-one; then at the death or second marriage of his wife, he devised his real estate to his son in tail, only yielding and paying unto his (testator's) daughters M. and E., each 100*l.* M. attained twenty-one, and married, and died before E. attained twenty-one:—Held, that the legacy was vested, payment only being postponed in consequence of the circumstances of the estate.*

This was a bill filed by the plaintiff as administrator of his deceased wife, and claiming a legacy under the will of George Brooks, out of the real estate.

By his will, dated in 1824, the testator, after disposing of his personal estate, gave and devised his real estate to his executors, in trust, that his wife should receive the

rents for the maintenance and bringing up of his son Thomas Brooks, and his daughter Ellen Brooks, if they should be under age, until they should attain twenty-one; and then his will was, that, at the death or marriage of his wife, he gave and devised his real estate unto his son Thomas Brooks, and the heirs of his body, lawfully issuing, for ever, only yielding and paying unto his (the testator's) daughters, Martha and Ellen, the sum of 100*l.* each; but in case his son Thomas should happen to die under the age of twenty-one, and without leaving lawful issue of his body, then his will and mind was, that his estate and lands above mentioned should be sold, and the money arising therefrom be divided between his two daughters Martha and Ellen, or the heirs of their body, male and female, share and share alike.

The testator died, leaving the three children named in the will, and a widow him surviving. The widow, in 1827, married again. Martha Brooks, one of the children, attained twenty-one, and married the plaintiff. She died in 1831, but before her sister Ellen attained twenty-one.

The question was, whether the legacy of 100*l.* to Martha Goulburn became a lapsed legacy, in consequence of Martha dying before her sister Ellen became of age, on the ground, that such legacy was chargeable only upon the real estate, in the event of Martha being alive at the coming of age of her sister Ellen.

Mr. Bethell and Mr. Dixon, for the plaintiff, contended, that the legacy was vested, and that payment only was postponed for the convenience of the estate. They cited *Pawlet v. Dogget* (1), 2 *Powell on Devises*, by Jarman, p. 235, *Dawson v. Killet* (2), *Poole v. Terry* (3), and *Emes v. Hancock* (4).

Mr. Spence and Mr. Harwood, contra.—The gift was not a present, but a future gift, and was contingent; and as Martha died before her sister was twenty-one, when the son was to take the estate, the legacy lapsed. They cited *Smell v. Dee* (5), *Wat-*

(1) 2 Vern. 86.

(2) 1 Bro. C.C. 119.

(3) 4 Sim. 294.

(4) 2 Ask. 507.

(5) 2 Salk. 415.

kings v. Cheek (6), *May v. Andrews* (7), and *Harrison v. Nayler* (8).

ALDERSON, B., at the hearing, stated, that his impression was that the legacy was vested, and that the payment was postponed in consequence of the circumstances of the estate; but he postponed judgment, in order that he might have an opportunity of looking into the cases.

This day, his Lordship said, that the whole difficulty seemed to him to arise from the mode in which the testator had given the rents. The case was brought within the rule, that when the postponement was for the convenience of the estate, the legacy did not lapse; and he was, therefore, of opinion, that this was not a lapsed legacy, and that he must decree for the plaintiff.

Decree accordingly.

ALDERSON, B. } SMYTH AND OTHERS v.
June 25, 26. } FOLEY AND OTHERS.

Marriage Settlement — Construction — Portions.

Portions for younger children decreed to be raised out of a reversionary term, in the lifetime of the father.

Quære — Whether “rents, issues, and profits,” mean annual profits merely, or authorize a sale.

By certain indentures of release and marriage settlement, made between John Matthews, of the first part, Richard Chambers the elder of the second part, Richard Chambers the younger of the third part, Richard Gray and Mary Elizabeth Gray of the fourth part, Anthony Lechmere and Robert Gray of the fifth part, and John Barnaby and John Surman of the sixth part, (being the settlement made on the marriage of the said Richard Chambers the younger with the said Mary Elizabeth Gray,) certain hereditaments and premises, situate in the parishes of Cradley, Isbitch, and Bosbing, in the county of Hereford, were, in consideration of the sum of 5,000*l.* paid by the said Richard Gray, as the

portion of his said daughter, in satisfaction of certain mortgages upon the said estates, conveyed and assured by the said Richard Chambers the elder and Richard Chambers the younger, to the said Henry Lechmere and Robert Gray, their heirs and assigns, to the uses following, (that is to say,) to the use of Richard Chambers the elder until the marriage, and after the solemnization thereof, to the use of Richard Chambers the younger, and his assigns for life, with remainder to the said A. Lechmere and R. Gray, to preserve contingent remainders; and after the death of the said R. Chambers the younger, to the use of Mary Elizabeth Gray for life; and after her decease, then to the use of the said John Barnaby and John Surman, their executors, administrators, and assigns, for a term of 500 years, upon the trusts thereafter declared; and after the expiration or other sooner determination of the said term, and subject thereto, to the use of the first and other sons of the said R. Chambers the younger, on the body of the said Mary Elizabeth Gray to be begotten, severally and successively, &c., with remainder to the use of all the daughters of the said R. Chambers the younger, as tenants in common in tail, with cross-remainders between them, with remainder to the use of R. Chambers the younger, in fee.

The trusts of the term of 500 years were declared as follows:—“And as to, for, and concerning the said term of 500 years hereinafter limited to the said John Barnaby and John Surman, their executors, administrators, and assigns as aforesaid, it is hereby declared and agreed between all the said parties to these presents, that the same is so limited to them, upon the trusts, and to and for the ends, intents, and purposes, and by, with, under, and subject to the powers, provisoes, and agreements hereinafter limited, expressed, and declared of and concerning the same, (that is to say,) in case there shall be an eldest or only son, and one or more child or children of the said Richard Chambers the younger, on the body of the said Mary Elizabeth Gray, his intended wife, to be begotten, then upon trust, that they, the said John Barnaby and John Surman, their executors, administrators, or assigns, by sale or mortgage of the said term of 500 years, or by such other

(6) 2 Sim. & Stu. 199.

(7) 1 Bro. C.C. 122, cited in *Dawson v. Killet*.

(8) 3 Bro. C.C. 102.

ways and means as they, or the survivor of them, or the executors or administrators of such survivor, shall think fit, shall and do raise and levy, or borrow and take up at interest, such sum or sums of money for the portion or portions of all and every such child or children, (other than and except an eldest or only son,) as are hereinafter mentioned—that is to say, if but one such child, the sum of 3,000*l.* of lawful money of Great Britain, for the portion of such only child, and if two or more of such children, then the sum of 4,000*l.*, to be equally divided between them, if more than one, share and share alike, the portion or portions of such of them as shall be a son or sons to be paid at his or their respective age or ages of twenty-one years, and the portion or portions of such of them as shall be a daughter or daughters to be paid at her or their respective age or ages of twenty-one years, or day or days of marriage, which shall first happen; and upon this further trust, that in the meantime and until the same portions shall become payable as aforesaid, the said John Barnaby and John Surman, their executors, administrators, and assigns, shall and do, by and out of the rents, issues, and profits of the premises aforesaid, raise and levy such competent yearly sum and sums of money for the maintenance and education of such child or children, as shall not exceed in the whole the interest of their respective portions, after the rate of 5*l.* in the 100*l.* yearly: provided always, that in case any of the same children shall happen to die before his or their portions shall become payable as aforesaid, then the portion or portions of such of them so dying, shall go and be paid unto and be equally divided among the survivor or survivors of them, when and at such time as the original portion or portions of such surviving child or children shall become payable: provided always, that it shall and may be lawful to and for the said John Barnaby and John Surman, or the survivor of them, his executors or administrators, at any time or times after the decease of the said Richard Chambers the younger, or in his lifetime, with his consent, by the ways and means aforesaid, to raise, levy, and pay any sum or sums of money not exceeding the sum of 600*l.*, for the putting or placing out

any such younger son or sons to any profession or business, or other advancement in life, before such time as his or their portion or portions become payable as aforesaid, such sum or sums of money so to be raised and paid for the advancement and putting out such younger son or sons, shall be deemed and taken as part of his or their portion or portions hereinbefore appointed to be raised or paid to him or them as aforesaid: provided also, that in case there shall be no such child or children of the said Richard Chambers the younger, on the body of the said Mary Elizabeth Gray, his said intended wife, begotten, besides an eldest or only son, or in case all and every such child or children shall happen to die, before all or any of the said portions shall become payable as aforesaid, or in case the said portions and such maintenance as aforesaid, shall by the said John Barnaby and John Surman, their executors, administrators, or assigns, be raised and levied by any of the ways and means in that behalf before mentioned, or in case the same by such person or persons as shall for the time being be next in reversion or remainder of the same premises, expectant upon the determination of the said term of 500 years, shall be paid, or well and duly secured to be paid according to the true intent and meaning of these presents, then and in any of the said cases and at all times thenceforth, the said term of 500 years, or so much thereof as shall remain unsold or undisposed of, for the purposes aforesaid, shall cease, determine, and be absolutely void to all intents and purposes."

The marriage took effect, and there was issue six children—namely, the plaintiffs, William Chambers, Jane Hulse Cotham, the wife of the plaintiff Alexander Cotham, Edward Thomas Harley Chambers, and the plaintiff Mary Gray Smyth, the wife of the plaintiff William Smyth, and the defendants, Richard Gray Chambers, the eldest son of the marriage, and Elizabeth Aston, the wife of the defendant Frederick Aston. Richard Chambers the elder had been dead some time, and Mary Elizabeth Chambers died on the 29th day of July 1834, leaving her husband, Richard Chambers the younger, and her six children, her surviving. The trustees of the term of

500 years were also dead, and the defendant Edward Thomas Foley, was the legal personal representative of the survivor. All the children having attained twenty-one, the bill was filed by the four children above named, against the trustee of the term, their father, Richard Chambers the younger, Richard Gray Chambers, the eldest son and tenant in tail under the settlement, and Aston and wife, who declined to join as plaintiffs, for the purpose of having their portions raised during the life of their father, the tenant for life, either by sale or mortgage of the reversionary term of 500 years.

Mr. Duckworth and Mr. Roupell, for the plaintiffs.—The portions are clearly raiseable during the lifetime of the father, although it is not sought to affect his life interest. The cases upon this question are very numerous, though few are of recent occurrence; during the last century the point was constantly before the Courts. It is admitted, in all the cases, that although the term is reversionary, yet the portions may be raised by a sale or mortgage of the term, if the portions are vested; and the two rules laid down by Lord Cowper, in *Corbett v. Maidwell* (1), have been constantly recognized and acted upon; they are as follows:—"First, that though a term is limited in remainder, to commence after the death of the father, yet, if the trust is to raise a portion payable at the age of eighteen or day of marriage, without question the daughter shall not wait the death of her father; but at the age of eighteen or marriage may compel a sale of the term." "Secondly, so it is, if the trust of a term for raising daughters' portions be limited to take effect, in case the father die without issue male by his wife, and the wife die without issue male, leaving a daughter, in such case the term is saleable in the life of the father." Lord Eldon approves of these rules in *Codrington v. Lord Foley* (2); and, after going through all the cases, states it to be the *prima facie* intention in these cases, that the portions should be raised when the interests are vested, either by mortgage or sale of the reversionary term. Here the interests are vest-

ed; the portions are directed to be paid *at twenty-one or marriage*, and if the trusts of the term stopped there, no doubt could arise; but it will be contended, that the subsequent clauses, for maintenance and advancement, afford indications of an intention on the part of the settlor, that the raising of the portions should be postponed until after the death of the tenant for life. In *Brome v. Berkley* (3) this distinction was taken and acted upon; the maintenance in that case being postponed until the terms came into possession, the Court held, that the raising of the portions must also be postponed. The reasoning in that case is not very intelligible; the maintenance clause is quite independent of the portion clause; there may be children who may be under twenty-one or unmarried at the time of the death of the father, and the maintenance clause must be taken to have them in view. However this may be, this case is totally different from *Brome v. Berkley*; there it was expressly directed that the maintenance should not be raised until the term *came into possession*; here, there are no such words; and the words, "rents, issues, and profits" cannot be confined to the annual profits; they authorize a sale or mortgage—

Ravenhill v. Dansey, 2 P. Wms. 179.

Lingen v. Foley, 2 Chanc. Cas. 205.

Trafford v. Ashton, 1 P. Wms. 419.

Green v. Belcher, 1 Atk. 506.

Okeden v. Okeden, 1 Atk. 550.

Hall v. Carter, 2 Atk. 355.

Gibson v. Rogers, Amb. 98.

Baines v. Dixon, 1 Ves. sen. 41.

It is observable, that in the maintenance, advancement, and other clauses of the settlement, the words, "payable as aforesaid" are carefully used, shewing clearly that the provisions made by those clauses were intended to take effect only until the period when the portions are directed to be paid, viz. *at twenty-one or marriage*. The advancement clause, instead of affording any evidence of intention against the plaintiffs, is quite the other way, as the trustees are thereby authorized to raise part of the portions in the father's lifetime, and the settlor therefore anticipated the probability of the children requiring part of their

(1) 1 Eq. Cas. Ab. 339.

(2) 6 Ves. 364.

(3) 2 P. Wms. 484.

portions even before twenty-one or marriage in his own lifetime. If he did so, can it be said that he did not intend that the whole should not be raised upon their attaining twenty-one or marriage? The following cases were then cited, and commented upon at some length—

Graves v. Maddison, Coote, Mort. 201.

Helier v. Jones, 1 Eq. Cas. Abr. 337.

Gerrard v. Gerrard, 2 Vern. 458.

Staniforth v. Staniforth, *ibid.* 460.

Sandys v. Sandys, 1 P. Wms. 707.

Reesby v. Newland, 2 P. Wms. 93.

Hobblethwaite v. Cartwright, Cas. Temp. Talb. (Forrester,) 32.

Stanley v. Stanley, 1 Hardw. Rep. by West.

Stanley v. Stanley, *ibid.* 146.

Hall v. Carter, 2 Atk. 354.

Stevens v. Dethick, 3 Atk. 39.

Lyon v. the Duke of Chandos, 3 Atk. 416.

Verney v. Verney, 2 Eden, 86.

Smith v. Evans, 2 Amb. 633.

Clinton v. Lord Seymour, 4 Ves.

Mr. Simpkinson and Mr. Simpson, for the defendants, Aston and wife, also contended, that the portions ought to be raised in the lifetime of the parent, the tenant for life; and cited *Cotton v. Cotton*, from the MSS. of Mr. Melmoth, in the Lincoln's Inn Library. That case was decided previous to *Brome v. Berkley*, and is opposed to the principle on which the last-mentioned case was decided, for in *Cotton v. Cotton*, although the maintenance was in express terms postponed until the term came into possession, Sir Joseph Jekyll decreed that the portions ought to be raised during the lifetime of the mother, the tenant for life, and did not consider that such postponement afforded any evidence of the intention of the settlor, with respect to the portions (4.)

Mr. Coote and Mr. Abraham, for the defendant, Richard Gray Chambers.—The tenant for life is likely to live for many years, and the portions can only be raised in his lifetime by sale or mortgage of the reversionary term: if by the former mode, the eldest son's interest will be reduced to a reversion expectant upon a term of 500 years; if by the latter, the accumulation of interest upon the principal will be so

great that the trustees might as well have sold: in either case a great injustice will be done to the eldest son, who is equally an object of the settlor's bounty as the younger children; and as his interest under the settlement must necessarily be postponed until after the death of the tenant for life, the payment of the younger children's portions ought not to be accelerated. Previous to *Codrington v. Lord Foley*, the Judges have always given some consideration to arguments of convenience and inconvenience; and although Lord Eldon, in that case, expresses disapprobation of the strong language of some of those Judges, yet he did not intend to exclude such arguments altogether; in fact, he expressly says, "that whatever weight such arguments might have in other cases, they had none in that before him." The observations of his Lordship are, in fact, entirely extrajudicial, and ought not to have greater consideration paid them than the positive decisions of Lords Hardwicke, Alvanley, and Macclesfield. The rule stated by his Lordship applies only to a case of a simple limitation to a parent for life, with a term in remainder; and "if there is nothing more," says his Lordship, "the portions are raiseable," &c. In the case now before the Court there is something more, and all the contingencies have not happened; as it is possible that the eldest son may die in the father's lifetime, and then one of the younger children becoming the eldest, the Court will have a bill filed by his brothers and sisters to compel him to refund the share of the portions now decreed to him—

Chadwick v. Doleman, 2 Vern. 528.

Mathews v. Paul, 2 Wil. 64.

Windham v. Graham, 1 Russ. 331.

In *Corbett v. Maidwell*, the existence of a contingency was held to be a sufficient ground to refuse the raising of the portions. But looking at the whole of this settlement, it is clear that the parties did not intend that the portions should be raised in the manner now sought. The maintenance for the children is clearly postponed until after the term shall come into possession; and that postponement has been held to be an evidence of the intention of the parties to postpone the portions also — *Stevens v. Dethick*, *Brome v. Berkley*, *Clinton v. Lord Seymour*. The mode of raising the maintenance is directed to be "by and out of the

(4) Through the kindness of Mr. Simpkinson, Q.C., and Mr. Wakefield, Q.C., the reporter has been enabled to take a copy of the case of *Cotton v. Cotton* from the MSS. See next case

rents, issues, and profits," which must be taken to mean the annual profits, and will not authorize a sale or mortgage—(see all the cases collected and distinguished in note to *Powell on Mortgages*, vol. 1, 726.)

Evelyn v. Evelyn, 2 P. Wms. 591.

Earl Rivers v. Derby, 2 Vern. 72.

Ivy v. Gilbert, 2 P. Wms. 13;

especially in this case, as the words are used in opposition to the words "sale or mortgage" in the portion clause, which shews that the settlor knew the meaning of the words he used, and intended them to be used in their strict and proper sense—*Corbett v. Maidwell*, *Mills v. Banks* (5). In *Hall v. Carter*, cited on the other side, the words were not used in opposition, and it is only a dictum. *Trafford v. Ashton* was overruled by *Evelyn v. Evelyn*; besides, a period was limited in that case for the raising, within which the portions could not be raised by rents merely. The principle of *Brome v. Berkley* is perfectly intelligible; and the argument, that the maintenance clause is quite independent of the portion clause, and is intended as a provision for those children only who may be under twenty-one or unmarried at the time of the death of the tenant for life, was urged in that case before the House of Lords (6), but without effect. The reason is plain; the postponement of the maintenance, until after the death of the parent, shews clearly that the settlor trusts entirely to the affection and ability of the father, the tenant for life, as ensuring to the children maintenance and education—those provisions which would be of the first importance in the eyes of a person having in view principally the benefit of the younger children, and who, it is contended, intends the children to have a large accession of fortune upon their attaining twenty-one or marriage. It is possible that the parent may become insolvent, when the children would be left without any provision during the father's lifetime, but on attaining twenty-one or marriage, would receive a large accession of fortune, for which they would be wholly unprepared. As the settlor trusts entirely to the father in the matter of maintenance, à fortiori does he so trust in the matter of portions, and evidently considers that the

parent will discharge all the duties which the relation of parent and child entails, and gives portions only in case of his death, when parental care ceases. The advancement clause still further evidences the intention of the settlor, and supports this construction. The sums advanced to a child are to be taken as part of its portion, and to be made before such time as his or her portion becomes payable. The question is, then, what is the meaning of the words "become payable"? They cannot mean twenty-one or marriage, whenever those events may occur, as the settlor directs, that advancement shall only be raised in the lifetime of the father, with his consent, which implies that it shall not be raised in any other way—*Butler v. Duncomb* (7). If he intended the portions to be raised in the lifetime of the father, without reference to his assent or dissent, surely he could not have fettered the trustees' discretion as to advancement. To say the least, the intention of the settlor is very doubtful, and in that case the eldest son is entitled to the benefit of the doubt. The instrument not affording a clear expression of the meaning of the parties, the Court must look to the intention of the parties, and then arguments of convenience are admissible, for the Court cannot suppose the settlor to have intended so great a hardship upon the heir. Although Lord Eldon, in *Codrington v. Lord Foley*, deprecates a leaning in favour of either side, yet in *Hope v. Clifton* (8), where the question also was between younger children and the representative of the eldest, his Lordship expressed himself very differently, and went so far as to say, that the Court would *struggle with language*, in order to give effect to the natural intention of the parties.

Corbett v. Maidwell, 1 Salk. 159.

Wingrave v. Palgrave, 1 P. Wms. 401.

Butler v. Duncomb, 1 P. Wms. 448.

Churchman v. Harvey, Amb. 335.

Hume v. Randall, 2 S. & S. 174; and

Wynter v. Bold, 1 Sim. & Stu. 507.

were also cited.

Mr. Duckworth, in reply.

Mr. Romilly appeared for Richard Chambers, the tenant for life.

Mr. Stinton, for the trustee of the term.

(5) 3 P. Wms. 7.

(6) 6 Bro. P.C. 113.

(7) 1 P. Wms. 432.

(8) 6 Ves. 506.

July 5, 1838.—ALDERSON, B.—This case has been most ably argued before me, and I thought it advisable, before deciding it, to look into the cases; although at the time of the argument I did not entertain any doubt as to the result at which I ought to arrive.

The question is, whether the portions of the younger children of Richard Chambers are raiseable immediately, or whether that is to be postponed until the death of the present tenant for life.

It is much too late now to consider as to the propriety of the rule on this subject, which has prevailed in courts of equity. Possibly, if it were *res integra*, I should not have come to such a conclusion; but being established, it is of much more importance to adhere to general rules, than, for any supposed convenience, rashly to depart from them. The titles and estates of men depend in a great degree on the fixedness of the rules by which courts are governed.

I take the rule, so far as it is necessary on the present occasion to state it, to be this. That where a term is limited in remainder, to commence in possession after the death of the father, yet if the trust is to raise a portion payable at a fixed period, the child shall not wait for the death of the father before the portion is raised, but at the fixed period may compel a sale of the term; and secondly, where the period is not fixed by the original settlement, but depends on a contingency, the rule applies as soon as the contingency happens; and thirdly, where not only the period, but the class of children in favour of whom the portions are to be raised, depend on a contingency, as when it is limited to take effect, in case the father dies without issue male by his wife, there also, on the contingency happening by the death of the wife without issue male, the portions are raiseable immediately, and the term is saleable in the lifetime of the father.

This being the general rule, derived from the presumed intention of the settlor that it should be so, it must, of course, follow, that if, taking the whole settlement together, this presumed intention is negatived, the rule can have no effect. Accordingly, on looking into the books, we find a variety of cases in which, from passages contained in the settlement, the Courts

have so decided. Some Judges, indeed, to whom the original rule was not satisfactory, have laid down incidentally, that the Courts would be eager to decide, or that they would lay hold of slight circumstances to decide against the rule. On the other hand, Lord Eldon, in a very able and elaborate judgment, has, I think, laid down the rule on its true and sound foundation, that the Court, holding an equal mind, ought to look at all the circumstances, and to see what, on a sound construction of the instrument, was the actual intention of the party. I entirely adopt this principle; any other would be to violate that which, it is conceded, ought to govern, viz. the intention of the party himself. How is it possible for a Judge to know, except from the instrument, that intention? How can he know whether his notions of expediency are the same as those of the party on whose expressed intentions he is to decide? A Judge may think the eldest son ought to be the peculiar object of consideration; the settlor may be of opinion that younger children in general are greater objects of favour. To adopt such principles would be to render everything uncertain.

Having premised these observations as to the principles by which I think this case must be decided, and which, without referring to them in more detail, I think may be deduced from a consideration of all the cases, I shall now proceed to apply them to the present case.

By this settlement the estate was settled on Richard Chambers for life; then on his wife for life, and from and after her decease to trustees for 500 years, for certain intents therein expressed, and, subject thereto, to the first and other sons successively in tail, remainder to the daughters as tenants in common in tail. The term was declared to be limited upon trust, in case there shall be an eldest or only son, and one or more child or children of Richard Chambers, on the body of Mary Chambers his wife to be begotten, then, that the trustees, by sale or mortgage of the term, should raise and levy, or borrow and take up at interest, for the portions of all such children, other than the eldest, 3,000*l.* if there should be only one such child, and 4,000*l.* if two or more such children, to be paid to such children at twenty-one if

sons, and at twenty-one or marriage if daughters. Now, the wife has died, and has left more than one younger child, and all the younger children have attained twenty-one. Every branch, therefore, of the contingency has occurred; and according to the rule of the courts of equity, to which I have before referred, I ought to infer, unless something else appears in the settlement to shew the contrary, that the intention of the settlor was, that these portions should be raiseable forthwith. Mr. Coote, indeed, contended, that there was still a contingency, viz. that the eldest son might die in the lifetime of his father. But that argument is not, I think, well founded. The question is, as to the state of the family when the event on which that which was before contingent becomes fixed, happens, viz. the death of the wife. On that occurring, the settlement is to be read as if it were in trust to raise 4,000*l.* for the portions of A, B, C, and D, (the then younger children,) to be paid to A. and B, the sons, at twenty-one, and to C. and D, the daughters, at twenty-one or marriage.

Then we are to look to the rest of the settlement, to see whether there is anything there from which we are to conclude that this payment is to be, "provided the father be then dead," or "provided the term of the trustees is then in their possession."

Now, it is contended, that this is to be decided from the next clause, by which the trustees are directed, "in the mean time, and until the portions shall be payable, to levy and raise out of the rents, issues, and profits of the premises, competent maintenance, not exceeding the interest of their portions, at 5*l.* per cent." I cannot accede to this conclusion. If the trustees had been directed to pay maintenance out of the rents and profits, and pay over the surplus to other parties, the argument would have been very different; for such a direction would necessarily have implied a possession by them of the rents, and would have shewn that the settlor contemplated maintenance previous to the payment of the portions out of the term in possession.

That was the case of *Brome v. Berkley*. There the first payment of the maintenance was limited to a period after the term was in possession. I do not fully accede to the reasoning on which that case

turns, and which is inconsistent with *Cotton v. Cotton*, cited from Melmoth's MSS. But, at all events, that point, which was clear there, is not at all so here. It is not at all clear here, that the intention may not have been that the maintenance, as well as the portions, may not have been intended to be raised by mortgage of the rents, issues, and profits in reversion. It was conceded, indeed, in argument, that this might be so, if that were the intention of the settlor. It is said, that the intention is doubtful whether rents, &c., mean annual rents or general profits. But even if that intention be doubtful, I cannot use this clause in order to negative the clear intention deducible from the other parts of the settlement.

The remaining clause seems to me to confirm the intention deducible from the first clause. There is a power given to the trustees to raise a part of the children's portions in the lifetime of the father, even before the portions were payable.

It is most probable that a settlor, who was willing that this should be done, would be desirous that the portions themselves should be paid to these objects of his bounty at the time he fixed, without waiting for the father's death. And this clause applies only to the younger sons, so that the daughters would, according to the construction of the defendants, have nothing in the lifetime of their parents, although the sons would be put forward in life. This is not a probable intention. I do not, however, place great reliance on this clause. As far as it goes, however, it confirms my previous view of the case.

Upon the whole, I have come to the conclusion, that the intention of the settlor, as expressed by the first clause, was, that on the contingency happening, and the children attaining twenty-one or marriage, the portions should be raiseable.

I think the other clauses of the settlement do not negative or induce me to doubt as to the settlor's intention on this point.

I propose, therefore, to decree, the children having all attained twenty-one, that the portions, amounting to 4,000*l.*, ought now to be raised by sale or mortgage of the term of 500 years.

Decree accordingly.

SIR J. JEKYL.
May 10, 1718.

COTTON AND OTHER
YOUNGER CHILDREN
OF SIR THOMAS COT-
TON V. SIR ROBERT
SALISBURY COTTON,
ELDEST SON OF SIR
THOMAS COTTON, AND
OTHERS.*

Marriage Settlement—Portions.

A term is limited in remainder after the death of a man and his wife, to raise daughters' portions at eighteen or marriage. One of the daughters attains that age after the death of her father. Decreed that the portion should be raised in the mother's lifetime.

Sir Robert Cotton, plaintiff's grandfather, settled lands by indenture, dated 17th of July 1701, the uses whereof as to part, were to Sir Thomas his son for life, then to his wife for life, remainder to defendant in tail male, with remainders over. But no maintenance in the meantime, the words of the settlement being expressly to the contrary.

The trusts of the term were, that in case Sir Thomas Cotton should die leaving any younger child or children by him begotten on the body of his wife, which should be living at his death, then it should be lawful for the trustees, out of the rents of the said estates limited for the said term, or by lease thereof, for the said five hundred years, or by felling of timber, or by any other means, as they should think fit, and for the advantage of such child or children, to raise such sums of money for the portions of such child or children, and pay the same in manner following—viz. if there should be but one younger child, then 3000*l.* should be raised for such younger child; and, if there should be two or more

such younger children, then 5000*l.* should be raised and be equally divided between them: if daughters, at eighteen or marriage, and if sons, at twenty-one; and until such portions should be payable and paid, to raise for such only child 60*l.* a year, for his or her maintenance and education; but, if more than one, then to raise and pay them the yearly sum of 50*l.* a piece by equal half-yearly payments at Lady-day and Michaelmas, the first payment to be made at the first of the said days which should happen after the commencement of the said term.

Sir Thomas Cotton died, leaving his wife and nine younger children, having made his will and some provision for them out of his personal estate after the death of his wife, who is yet living.

The plaintiff, Philadelphia, has attained her age of eighteen, and she and the rest of the younger children bring their bill against the defendant, their elder brother, and the trustees of the term. Philadelphia insists, that her portion being become payable, it ought to be raised by sale of the reversionary term, and be paid her, together with the arrears of the 50*l.* a year maintenance from the death of her father; and the rest of the plaintiffs insist upon the like maintenance; and the better to support the demand of maintenance, it was urged on the behalf of the plaintiffs, that they had no other provision in present but by the settlement, and that it could never be the intention of Sir Robert Cotton, when he made this provision for the younger children, that they should be destitute of a maintenance until their portions should become payable.

The MASTER OF THE ROLLS.—As to the plaintiff Philadelphia's share of the 5000*l.*, she having attained eighteen, I am of opinion, it ought to be raised out of the reversionary term, with interest from the time it became payable, though the Lady Cotton is still living; and let the *Master sell* (1) what part of the trust estate is proper to be sold or mortgaged for that purpose. But, as to the point of maintenance, I am of opinion, there is no pretence for it, the settlement being express, that the first

(1) These words are very indistinct in the MSS., but they appear to be as above.

* From the MSS. of Mr. Melmoth in Lincoln's Inn Library. The MSS. of Mr. Melmoth are characterized by Mr. Hargrave in his first volume of the Juridical Arguments, 425, as the valuable manuscript reports of Mr. Melmoth, and he is described as the father of the elegant translator of Tully's and Pliny's Letters, and author of Fitzosborne's Letters, and the co-editor with Mr. Peere Williams of Vernon's Reports, under an order of the Court of Chancery in England, and an eminent practising barrister in equity for many years, and as having a little before his death advertised his reports for publication.

payment of the maintenance is to be made at the first of the days of payment, which should happen next *after the commencement of the term*; which term by the settlement does not, nor can, commence till after the death of my Lady Cotton, who is living. As to the hardship of the case in respect to the plaintiffs, this Court cannot take that into consideration, but must judge upon settlements as they find them, and as the parties have thought fit to make them; it would be to no purpose to make deeds, if this Court should construe them according to what may be for the convenience or inconvenience of the parties.

ALDERSON; B. }
1887. } GREENFELL V. GIRDLE-
Dec. 1, 4, 5, 15. } STONE.

Record, Custody of—Judgment Creditor—Judgment void from lapse of time.

An order having been improperly obtained in this court, for the production of the records of the proceedings in a suit in the Court of Great Sessions, Wales, they were forwarded by the registrar of that court, through his agent in London, to the clerk in court of the plaintiff, the proper officer:—Held, till such order was rescinded, that they were to be deemed to be in the proper custody.

A judgment creditor having taken no steps to enforce payment of his demand, for a period of twenty-eight years, filed his bill for relief one day before the stat. 3 & 4 Will. 4. c. 27. came into operation:—Held, that independently of the question of presumed satisfaction, he was barred from relief by his own laches.

Thomas Williams, late of Llanidan, in the county of Anglesea, esq., having by his will appointed the plaintiff and another person, since deceased, his executors, they, in Easter term, 1805, obtained and entered up judgment, which was duly docketed, in the Court of King's Bench, against one Thomas Grindley, for the sum of 3,375*l.* and costs; he at the time being seised in fee of two estates in Carnarvonshire, which were subject to a mortgage for 800*l.*, under an indenture of demise for 500 years, dated

the 5th of August 1804, to one William Casson; and of estates in the county of Anglesea which were subject to a mortgage similarly demised, dated in 1802, to one John Roberts.

T. Grindley, in November 1805, entered into a written agreement with Robert Morris, as agent for W. A. Madocks, to sell him two of the estates for 1,120*l.*, and also two other of the estates for 4,130*l.* These comprised the estates in Carnarvonshire. Morris, as agent of Madocks, was at the same time served with a written notice of the above judgment.

Grindley and Madocks afterwards, viz. on the 13th of December 1806, executed another agreement in respect of the same premises, in which it was stipulated, that Mr. Shadwell, on behalf of both parties, should prepare the conveyance; that, by the 30th of December following, a proper abstract of the bill should be furnished; that the mortgagees and other proper parties should join in the conveyances; and that, by the 1st of February following, the purchase-money should be paid, and the premises conveyed. Then came the following clause:—“And the said Samuel Grindley agrees, that the said conveyance shall contain all proper and necessary covenants for the title to the said farm and hereditaments; and he declares and engages, that the incumbrances now affecting the same, are the following only, which are to be paid out of the said purchase-money, and the mortgage assigned to the said W. A. Madocks, or a trustee nominated by him, on or before the 1st of February next—viz. To the executors of the late Thomas Williams, esq., about 1,300*l.* and interest, from April 1804; to John Roberts, of Newsfynydd, 800*l.* and interest; to Mr. Casson, 600*l.* and interest.”

Indentures of lease and release, dated the 20th and 21st of March 1810, were made between Grindley of the first part; J. B. Sparrow, H. R. Williams, and John Bradley, of the second part, and others, the creditors of Grindley, who should by themselves or their agents execute such indenture, of the third part, by which it was witnessed, that, for the considerations therein mentioned, Grindley released and

conveyed to the use of Sparrow, Williams, and Bradley, and their heirs, all the above-mentioned estates, subject to all leases and mortgages, or annuities affecting the premises, upon trust, with all convenient speed to sell the same, and, after payment of all costs attending the trusts, to pay off a certain mortgage therein stated to be due to William Harvey, esq., (which was paid off,) and all other mortgages and annuities affecting the premises, and pay and divide the clear residue of the purchase-moneys, towards payment of the creditors, parties to the deed, their respective executors, &c.; and the surplus (if any,) to such persons as Grindley should appoint, and subject thereto, to the use of Grindley, his executors, administrators, and assigns. Neither of the executors under the will of Thomas Williams were made parties to this deed; soon after the execution of which, Grindley died, leaving his son the defendant Samuel Grindley, his heir-at-law, and his widow, Sarah Grindley, his administratrix.

The creditors under the trust deed filed a bill in the Court of Great Session in 1810, against Samuel Grindley the son, Sarah Grindley, and the trustees, praying the usual accounts of the testator's personal estate and effects, and that they might be applied to the payment of his debts; and that, if necessary, the real estate of the intestate might be sold for that purpose. The cause came on for hearing on the 1st of April 1811, when the Court directed the accounts to be taken, and an inquiry to be made as to the real estates of the intestate, and the incumbrances affecting them. The registrar made his report on the 19th of August following, wherein he stated the contracts between Grindley and Madocks, and that they had not been completed; on which the Court, upon further directions, ordered, that the trustees, Sparrow, Williams, and Bradley, should be at liberty to complete the agreement with Madocks, and receive the purchase-money. Madocks not completing the purchase in pursuance of this order, a further order was made, that the trustees should be at liberty to file a bill against him to complete the contracts, which they did in 1815, but he being then out of the jurisdiction of the Court, and in embarrassed circumstances, no further proceedings were had in that suit.

The estates comprised in the trust deed were ultimately sold, subject to existing incumbrances, and the money paid to the creditors. In 1808, Casson filed a bill of foreclosure against Grindley, which he afterwards continued against Madocks, for the purpose of recovering the 800*l.* due upon his mortgage, which Madocks paid off in 1810, he taking an assignment of the mortgage term of 500 years, to a trustee, for himself. He, afterwards, by an indenture dated the 28th of December 1811, granted an annuity to three lives, to one Edmund Stone, (since deceased,) on the security of the Carnarvon estates, when the term of 500 years, held by Madocks's trustee, was assigned to the defendant Metcalf, in trust for Stone. Madocks, by another indenture of the 1st of February 1812, granted a similar annuity to James Bellamy, (since deceased,) upon the security of one of the estates in Anglesea, when Bellamy paid off the mortgage to Roberts, whose term of 500 years was thereupon assigned to a trustee in trust for Bellamy. Madocks died in 1828, not having completed his contracts to purchase. The annuitants, or their representatives, in consequence of their annuities becoming in arrear, took possession of the lands on which they were secured.

This bill was filed in 1833, on the day before the 3 & 4 Will. 4. c. 27. came into operation, by the plaintiff, as surviving executor of Thomas Williams; and it alleged, that at the time of entering up judgment against Grindley, and till his death, he was utterly insolvent; and that his lands, &c. were so mortgaged and incumbered, that even if the plaintiff had taken out execution on the judgment, he could not have satisfied it by taking the person or property of Samuel Grindley, in execution. It charged collusion between Madocks and the trustees, whereby the latter were induced not to take the proper proceedings against him; and further, that in consequence of the legal estate in the premises being outstanding, in persons wholly unknown to the plaintiff, they having acquired it before the judgment was entered up, he was wholly unable to avail himself of it. In then prayed, that the plaintiff might be declared entitled to have the sum secured by the judgment, and the interest

thereon, satisfied out of the hereditaments possessed by the defendants Girdlestone and Bellamy, (Stone's interest being represented by the former, as his sole executor, and Bellamy's, by him and the latter defendant,) and out of the purchase monies for such hereditaments, received by the trustees, subject to what remained due on the mortgage of 800*l.* on the Carnarvonshire estates, which, if the Court should think he was bound to pay, then that he might be at liberty to redeem it, and have his judgment satisfied in the manner mentioned. And after a prayer for accounts, it prayed, that, if necessary, the bill might be taken to be a supplemental bill to that filed in the Court of Great Session.

Evidence was given of the insolvency, &c. of Grindley and Madocks, from the time of the entering up the judgments, to their deaths: amongst which were the records of the proceedings in the Court of Great Session.

The admission of these was objected to by the defendants on two grounds: first, because the defendants were not parties to the original suit, which was *res inter alios acta* as to them; and, secondly, because the documents did not come out of the custody of the proper officer.

For the plaintiff it was contended, that the record of the proceedings in the Welsh court, was good evidence to shew the circumstances of Grindley during the progress of the suit; and that the documents, being in the hands of the plaintiff's clerk in court, were in the proper custody.

It appeared, that the plaintiff's clerk in court received them, through the agent of the registrar of the Welsh court, in whose proper custody they were in Wales, and by whom they were transmitted through his agent in London, to the plaintiff's clerk in court, under an order of this Court, which order was obtained *ex parte*,—the Court not being apprised of the circumstances of the case.

ALDERSON, B.—As the object of this evidence is to shew the circumstances of Grindley, it is immaterial whether the defendants are to be considered as parties to the suit in the Welsh court. It is evidence of the circumstances of a party, that a suit has been instituted against him for the purpose of administering to his effects; as in

the case of a fraudulent preference, it is shewn, that writs have been issued against the party by third persons. His *status* is shewn by it. In regard to the other point, as at present advised, I am of opinion; that the Court had no right to make the order for the production of these documents; but, the documents being now in the custody of an officer of this court, under an order of the Court, the question is, whether they are not in the proper custody. I do not think it is like the case of documents delivered to an indifferent third party: besides, upon inquiry, I find, that, under an order properly obtained, they would have been in the custody of the same officer, who now produces them; therefore, until the order which has been obtained is rescinded, I shall consider them as coming out of the proper custody.

Mr. Boteler and Mr. G. Richards, for the plaintiff.—There was a clear notice of the incumbrance claimed by the plaintiff being in existence down to the death of Grindley. It appeared in the papers which came from the Bellamys, which included the abstract of title, &c. delivered to Mr. Shadwell. It is noticed in the recitals of the deeds of annuity, as well as in the copy of agreement of 1806, which are also in their possession. With such notice of the incumbrance, could the legal estate avail for the protection of the defendants? Then, as to lapse of time: the insolvency of the debtor destroys the presumption of payment. In *Fladong v. Winter* (1), in which the case of *Wynne v. Waring* is cited, it was held, that the presumption of payment of a bond after twenty years, may be repelled by evidence that the obligor had no opportunity or means of paying. This was clearly the situation of both Grindley and Madocks from 1808 till their respective deaths. Madocks could not specifically perform the agreement; nor could the plaintiff proceed against his personalty pending the decree in the Court of Great Session, nor, whilst the mortgage existed, against the land. It is not necessary to enter into evidence to shew, that Madocks had not been able to pay off the claim, as such payment was not set up in the answer, or satisfaction entered on the record of judgment.

The decree in the Welsh court was notice to all the world.

Sir Charles Wetherell, Mr. Girdlestone, and Mr. Metcalfe, for the defendants Girdlestone, John Bellamy, and Metcalfe.—The dates are of importance. The judgment was of Easter term 1805. All the parties lived near together. The judgment was on a warrant of attorney. In case of a presumed satisfaction, the nature of the judgment is an important consideration. The mortgages to Casson and Harvey take a priority of the judgment. No execution was sued out upon the judgment. There has been a failure here of both legal and equitable diligence:—it is not attempted to be shewn, that from the year 1805 to the year 1833, anything was done by the judgment creditor to enforce his right. A judgment creditor, seeking equitable relief against the personal estate of his debtor, must shew that he has used due diligence to enforce his legal claims by taking out execution under the judgment—*Angell v. Draper* (2), *Shirley v. Watts* (3). Then, as to the circumstances of Madocks, the failure of activity on that account would be sufficient, on the ground of laches, to dismiss the bill. In *William v. Gorges* (4), which, in some measure, resembles this case, an issue was directed, when the Court directed the jury to presume, from lapse of time, that the judgment had been satisfied. Such must be the presumption here, should an issue be directed, which we do not decline, but submit that there is sufficient here to dismiss the bill without it. There are two questions for decision—viz. whether the Court is satisfied that the plaintiff, as a judgment creditor, under the circumstances stated, was right in filing his bill for redemption; and if so, whether, by lapse of time, he has not lost his remedy. It is contended, that he has, independent of notice, no right to redeem. There is no proof that the judgment was docketed: nothing to shew that the judgment has been kept alive so as to bind the lands. The judgment is revived only against the personal representative of Grindley: that is not sufficient to bind the lands: he ought, upon a return of *nihil* to the writ of *scire facias*,

to have sued out a writ against the heir or *terre tenant*—1 *Wms. Saund.* 4th edit. p. 6, c. n. 4; p. 72, b, n. 1, 3; p. 72, m; 72, n. The revival of the judgment against the personal representative, is only the first step; the heir is not bound by that, neither are the *terre tenants*. Then, as to whether his right to redeem has not been barred by lapse of time, which will have a double operation, either as a complete bar to the claim, or as an ingredient in the question of presumption of payment. Undisturbed possession for twenty years by an ordinary mortgagee, is clearly a bar to the right of redemption—*Ashton v. Milne* (5), and the same rule applies to a creditor who sleeps upon his rights for the same period, as it is presumed his debt has been paid—*Campbell v. Graham* (6). The defendants here cannot be in a worse position than the original mortgagee would have been in.

[ALDERSON, B.—Do you mean to contend that this security has not been treated as a mortgage for more than twenty years?]

Yes: it was assigned to these defendants in 1811 as a mortgage title. It has not been so treated since; consequently, the question is, whether, after so long a lapse of time, payment of the debt is not to be presumed. No step was taken by the judgment creditor from the year 1805, when the purchase is made by Madocks, to the 30th of December 1833, the day before the statute 3 & 4 Will. 4. c. 27. came into effect, to assert his right. No proceedings were taken to enforce the judgment: there is merely a notice of the judgment given by the plaintiff Morris to the agent of Madocks in November 1806. In 1810, Grindley conveys all the property to trustees for the benefit of creditors, and a suit is instituted to carry it into effect, of which the plaintiff took no advantage. The plaintiff, it is said, might stand on his judgment; but, then, why not take steps to enforce it? The most material document in the proceedings in the Master's report is not here. It is not shewn whether the plaintiff is included as a creditor. This bill is not a supplemental bill. The plaintiff here claims adversely to the parties in the Welsh

(2) 1 Vern. 399.

(3) 3 Atk. 200.

(4) 1 Campb. 217.

(5) 6 Sim. 388; s. c. 3 Law J. Rep. (N.S.) Chanc. 52.

(6) 1 Russ. & Myl. 453; s. c. 9 Law J. Rep. Chanc. 234.

suit. If, therefore, the plaintiff came in under the decree in that suit, he would be out of court here; and, if he did not, and if Grindley was insolvent, can it be believed that he would not have immediately acted against Madocks, and those under him? In *Barron v. Martin* (7) redemption was refused, though the account was delivered within twenty years, it being so delivered without any authority, by a manager or receiver of the estate, and the employer being in a state which rendered him incapable of managing his affairs. A conveyance by a debtor to trustees for payment of scheduled creditors, who do not execute the deed, or conform to his terms, cannot be enforced by the creditors—*Walwyn v. Coultis* (8).

Mr. Simpkinson and *Mr. Duckworth*, for the defendants, the trustees of the indentures of the 20th and 21st of March 1810.—The case made by the will differs from that as opened for the plaintiff. It does not proceed upon the agreement of 1806: it does not attempt to follow the money set apart, or alleged to be set apart on that agreement, for the payment of the incumbrances; but is a common bill by a judgment creditor to have the money raised out of the purchase-money received by the trustees for purchased lands. What equity can the plaintiff have against the purchase-money of the lands sold by the trustees? What authority is there for this demand, supposing even that the judgment be still in existence? for the demand extends to the purchase-moneys paid to the creditors under the trust deed, and expended by them in the purchase of other lands. There is no privity between the plaintiff and the trustees. His claim may be against the purchased lands, but these were not in the possession of the trustees when the bill was filed. He cannot go against the monies. The suit originally instituted in Wales was a creditors' suit, to which the plaintiff was not a party; nor can he be made a party to a supplemental suit instituted here, the proceedings having been improperly removed, they not being removed till 1837, although this bill was filed in 1833. The plaintiff cannot sustain his claim under the

agreement of 1806; that was a mere private agreement between Grindley and Madocks, to which the plaintiff was not a party; and so far from considering himself bound by that agreement, he files this bill, with which it is inconsistent. He is a mere volunteer, and cannot avail himself of it. Then, independent of the question of presumed satisfaction, this is a stale demand, which is not to be enforced in a court of equity. Here is a judgment entered up in 1805; there is notice of that judgment to some of the parties in 1806; and, although it is revived against the personal representative of Grindley in 1821, yet no proceedings are taken to enforce it till 1833. *Fladong v. Winter* is distinguishable from this. It is not merely on the ground of presumption from lapse of time that a judgment has been satisfied, that a court of equity will refuse to interfere, but on that of delay; for, however valid the claim may be, after great lapse of time, the Court will not interfere—*Cholmondeley v. Clinton* (9). It will not give relief after an adverse possession of twenty years—*Cuthbert v. Creasy* (10), *Baldwin v. Peach* (11).

Mr. Koe, *Mr. Wilbraham*, and *Mr. Belamy*, for other parties.

Mr. Boteler, in reply, on the question as to the plaintiff being barred by laches, cited the judgment of the Master of the Rolls in *Hercy v. Dinwoody* (12), *Pickering v. Lord Stamford* (13), *Raffety v. King* (14).

Dec. 15, 1837.—*ALDERSON, B.*—I have now to deliver my judgment on the two points which I reserved for further consideration, and which are both of them of importance.

The questions are, whether the plaintiff is barred by his laches in not suing earlier for the relief which he now prays by his bill; and whether, if that be not so, the Court, taking all the circumstances into consideration, ought not to presume, as a fact, that the judgment on which he grounds

(9) 2 Mer. 171; s. c. 2 Jac. & W. 2; 4 Bli. N.S. 1; 1 Turn. & R. 107.

(10) 4 Bli. 125.

(11) 1 Y. & C. 453.

(12) 2 Ves. jun. 87.

(13) 2 Ves. jun. 272, 581.

(14) 1 Keen, 617; s. c. 6 Law J. Rep. (N.S.) Chanc. 87.

(7) Coop. 189.

(8) 3 Mer. 707; s. c. 3 Sim. 1, n.

his claim has been satisfied, or direct an issue to try that as a question of fact by a jury.

The circumstances are shortly these :— In 1805, the plaintiff and his co-executor recovered a judgment against a person of the name of Grindley for a debt. That judgment, having been properly docketed, became an lien on the real property of the debtor. But, there being then, as now, an outstanding term created anterior to the judgment, the plaintiff's remedy was, from the beginning, a remedy in a court of equity alone. Subsequently to this judgment, (in 1808,) the real estate in question was sold to Mr. Madocks; and by Madocks was afterwards conveyed to the defendants; and the term to which I have before alluded, was assigned to a trustee for the defendants' protection and benefit. It is conceded, that both when the sale to Madocks took place, and again when the conveyance was afterwards made to the defendants, both Madocks and the defendants had notice of the judgment, and of its remaining unsatisfied. The present suit was not instituted till 1833, twenty-eight years after the judgment, and, with the exception of the notice given in 1808 to Madocks, the plaintiff does not himself appear personally to have done anything in the intermediate period to enforce his rights. Much evidence has been given to shew, that, from the embarrassed state of Mr. Grindley and of Mr. Madocks, it ought to be inferred that neither of them could possibly have satisfied the amount of the judgment, and the plaintiff desires me to infer from this, that the judgment has not really been satisfied, but is still outstanding and unpaid. But it is quite clear and undisputed, that for twenty-eight years, the plaintiff has had the power of enforcing payment out of a sufficient fund by a suit in equity; and that he has taken no steps for that purpose. Upon full consideration, I am of opinion, that he is now too late. I adopt the principles laid down by Lord Camden in *Smith v. Clay*, in a note to *Deloraine v. Browne* (15), "A court of equity, which is never active in relief against conscience, or public convenience, has always refused its aid to stale demands,

where the party has slept upon his right, and acquiesced for a great length of time. Nothing can call forth this Court into activity, but conscience, good faith, and reasonable diligence: where these are wanting, the Court is passive and does nothing. Laches and neglect are always discounted, and therefore from the beginning of this jurisdiction, there was always a limitation to suits in this court. Therefore, in *Fitter v. Lord Macclesfield*, Lord North said rightly, that though there was no limitation to a bill of review, yet, after twenty-two years, he would not reverse a decree, but upon very apparent error. *Expediit reipublice ut sit finis litium* is a maxim that has prevailed in this court at all times, without the help of an act of parliament. But as the Court has no legislative authority, it could not properly define the time of bar, by a positive rule, to an hour, a minute, or a year; it was governed by circumstances. But as often as parliament had limited the time of actions and remedies to a certain period, in legal proceedings, the Court of Chancery adopted that rule, and applied it to similar cases in equity. For when the legislature had fixed the time at law, it would have been preposterous for equity, which, by its own proper authority, always maintained a limitation, to countenance laches beyond the period that law had been confined to by parliament; and, therefore, in all cases where the legal right has been barred by parliament, the equitable right to the same thing has been concluded by the same bar. Thus the account of rents and profits in a common case shall not be carried beyond six years; nor shall redemption be allowed after twenty years' possession in a mortgage—*Jenner v. Tracey*, 1731, (marginal notes on 3 *Wills*. 287.) Same thing in *Belch v. Harvey* (*ubi supra*), adding, that the statute having given ten years after disability, that ought to be observed. By the like analogy, the House, in *Edwards v. Carrol*, determined that twenty years should bar a bill of review, because the statute of Will. 3. had barred all writs of error after that period."

These principles I find to have received the approbation of Lord Alvanley, in *Hercy v. Dinwoody*, and of Lord Brougham and the House of Lords, in *Campbell v. Gra-*

ham (16). Now, then, we are to apply these principles to the present case, and, if so, we ought to adopt in equity the same rule, *mutatis mutandis*, which prevails at law as to time. The rule at law is, that a bond or judgment cannot be enforced if nothing be done upon it for twenty years, and no circumstances can be shewn to explain the apparent laches of the party.

By parity of reasoning, then, if more than twenty years have elapsed, and nothing has been done in equity, and no circumstance can be shewn to explain that neglect, it seems to me, that in equity also the party ought not to be allowed to succeed.

Now, that is the present case. Whatever may have been the circumstances which the plaintiff relies on to explain his not suing at law, or to shew that the judgment is still due, there is no reason at all for his not having proceeded in equity. It is clear, that for twenty-eight years he has had an estate competent to the payment of this debt, against which he could have proceeded. Why has he not done so? Can he be said to have used that reasonable diligence, without which, as Lord Camden says, a court of equity will not help him? I think not; and the consequence must follow. The Court, as Lord Camden says, "will be passive and do nothing." It will not act to dispossess the defendants of their better title at law. The same principle, as it seems to me governed Lord Eldon in *Cholmondely v. Clinton*. There the plaintiffs were, it is said, not bound by the lapse of time from bringing their ejectment; but their right had existed complete for relief in equity for more than twenty years, and they had not pursued it. Lord Eldon held, that though they might, perhaps, not be barred at law, they were barred in equity. Even, therefore, if I were of opinion here, that the plaintiffs had a remedy still open at law, notwithstanding this lapse of time upon the judgment, I should think that the doctrine of Lord Eldon would fully warrant me in holding, that the unexplained laches in equity would bar the plaintiff in this court.

It would be sufficient for me to stop

here: but I may as well add, that on the second point also, I think the defendants in the right. There are, undoubtedly, circumstances which have a tendency to shew, that it is not probable that either Grindley or Madocks were ever in funds, so as to pay off this debt. But I think, that after a lapse of so long a period without any attempt to enforce it by the plaintiff, the plaintiff ought to shew to demonstration that the judgment has not been satisfied. The case cited from *Campbell* (17) is fully as strong as this, and yet there Lord Ellenborough directed a verdict. The inference from lapse of time should, as much as possible, be treated as founded on a rule analogous to the Statute of Limitations, rather than as leading to a conclusion of mere fact. Few persons believed, I apprehend, in the cases of rights of way, or of lights, before the recent statute, that any such grants as used to be suggested in pleading ever were actually made, and yet every Judge directed that, after twenty years' usage, and every jury used to find the fact of a grant in conformity to the usage. It is far better that it should be so treated. Undoubtedly, where very cogent evidence exists to the contrary, there are authorities which warrant a decision that a specialty after a lapse of twenty years may be treated as still unsatisfied. *Fladong v. Winter* was put as one of such cases. As a question of fact, I should have drawn a different conclusion from the Master in that case. But the Master having so decided, I should have concurred with Lord Eldon in confirming that report, on the ground of the parties refusing to try the fact at law; which was the case there. In *Wynne v. Waring*, I think the evidence amounted to demonstration; here, that is not so. The unexplained fact of no attempt to fix the land with the debt, is the strongest fact in the whole case to shew that the judgment was satisfied, and appears to me infinitely stronger than the facts of the embarrassments of Grindley and Madocks to the contrary.

I think, therefore, that, on the whole, the bill must be dismissed, with costs.

Decree accordingly.

(17) *Willsuame v. Gorges*.

C. B. { *Ex parte* ELLISON, in the
May 2, 1837. { matter of THE CORPORATION OF THE TRINITY.

Baron and Feme—Assignment—Lighthouse.

A husband may assign his wife's share in a lease in a lighthouse, granted by the Corporation of the Trinity House.

By indenture of lease, dated the 1st of October 1795, and executed by the master, wardens, and assistants of the Trinity House, of the one part, and Henry Smith of the other part, reciting letters patent empowering the Trinity House to give authority to persons to erect lighthouses, and reciting the convenience which had been afforded to mariners by the erection of the Long-ships Lighthouse; and that Smith had erected the same, and had also caused certain poles or trees to be placed on the neighbouring rock, called the Wolf Rock, or Rundle Stone; it was witnessed, that, in consideration of such erection by Smith, and other considerations in the indenture mentioned, the parties thereto of the first part, did demise unto the said Henry Smith, his executors, administrators, and assigns, the said lighthouse, together with the site thereof; and also the said poles or trees, and all tolls, dues, and customs, payable in respect of the said lighthouse, to hold, &c. for the term of fifty years, from the 29th of September 1795, at the rent of 100*l.* per annum. The lessee was not to assign without permission of the corporation, and the actions to be brought by the lessee were to be in the name of the corporation.

On the 24th of October 1829, the lessee died intestate, leaving a widow and four children. The widow died in 1815, having made her will in favour of the children, by which, and the intestacy of the father, the four children became entitled in equal shares. Her son, Henry Pascoe Smith, was appointed her executor.

Betsy Ellen, one of the four children, in July 1829 married, without any settlement being executed, Captain Ellison, who afterwards charged his wife's fourth share with an annuity of 60*l.* a year, during the remainder of the term, to George Key, who subsequently assigned it to T. Kear-

sey, by whom further sums were advanced, in consideration of which a new annuity was granted, making together 240*l.* per annum. This annuity was secured by a deed, executed by Captain and Mrs. Ellison, bearing date the 27th of February 1830, by which the annuity was made payable during the remainder of the term of the lease, and redeemable in the usual manner.

On the 21st of August 1830, Captain Ellison, by an indenture, assigned his interest in the lighthouse, &c., subject to existing incumbrances, to Messrs. Mears and Hughes, the petitioners, upon trust, to pay an annuity of 300*l.* a year to Mrs. Ellison, to her separate use, during the remainder of the term, but without power of anticipation; the residue was to be paid to Captain Ellison.

By the statute of the 6 & 7 Will. 4. c. 79, which vests the property in all lighthouses in England in the Trinity House, and which recites, among other things, that the Long-ships Lighthouse is held by Henry Pascoe Smith, Esq. (the administrator of Henry Smith, the intestate), by virtue of a lease from the Trinity House, that corporation (see section 3) is empowered to purchase several lighthouses, amongst which is the Long-ships, and the tolls belonging to them, of the owners or persons interested in those lighthouses; and the act declares, that for the preventing of any question as to the title, the person who shall be in possession from the time from which the purchase shall take effect shall be deemed to have a complete title. The 24th section directs, "that the purchase-money, if it exceed 200*l.*, shall be paid into the Court of Exchequer." The 26th section enacts, "that in case any vendor shall not be able to make a good title to the satisfaction of the corporation of the Trinity House, they may order the purchase-money to be paid into the Bank of England, in the name of the Accountant General of the Exchequer, to the credit of the Trinity House, and the parties interested, subject to the order of that Court."

The corporation of the Trinity House, under the powers vested in them by this act, entered into an agreement with Capt. Ellison for the purchase of his and his wife's remaining interest in the property

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at 6,899*l.* 6*s.* 7*d.*, the corporation taking upon themselves the responsibility of discharging the several incumbrances. Accordingly, an indenture of assignment was prepared for that purpose, bearing date the 8th of March 1837, and was executed by the proper parties. The corporation, about the same time, undertook to repurchase Kearsey's annuity of 240*l.*, at the sum of 1,540*l.*, and for that purpose an agreement was executed.

A doubt having afterwards arisen, as to whether Captain Ellison could make a good title to the property, the purchasers, under the 26th section of the act, paid the money into court. The ground of their objection was, that the interest of the parties holding under the lease was not that of a chattel real, but a chose in action, or a mere personal interest, vested in Mrs. Ellison during the term; and that it was not assignable by her husband.

A petition was now presented by Capt. Ellison and the trustees under the marriage settlement, praying that a sum of 3,000*l.*, part of the sum of 6,899*l.* 6*s.* 7*d.* might be paid to the trustees, for the purpose of securing Mrs. Ellison's annuity during the remainder of the term, and that the residue might be paid to Captain Ellison, and that the corporation of the Trinity House might be ordered to pay the costs of this application.

Mr. Simpkinson and *Mr. Pigott*, for the petitioners.—The interest of Mrs. Ellison in this lighthouse and tolls was a chattel real, and, as such, was properly assignable by her husband—*Negus v. Colter* (1), *Knapp v. Williams* (2), *Howse v. Chapman* (3), *The King v. Bates* (4), *The King v. Winstanley* (5), *Donne v. Hart* (6). As there was an express covenant by the lessee not to assign without the permission of the lessors, the object of which was, that the leases might be drawn in a proper form, the parties must have considered the lease assignable.

Mr. Boteler and *Mr. L. Wigram*, contra.—No power is given to the corporation of

- (1) Amb. 367.
- (2) 4 Ves. 430.
- (3) Ibid. 542.
- (4) 3 Price, 341.
- (5) 8 Price, 180.
- (6) 2 Russ. & Myl. 360; s. c. 1 Law J. Rep. (N.S.) Chanc. 57.

the Trinity House by the 8 Eliz. c. 13, to grant assignable leases; the powers vested in them rest entirely on confidence in their skill, which confidence cannot be delegated. The word "assigns," in that statute, means nothing more than agents. Besides, there is a clause in the lease, that actions brought by Smith were to be brought in the name of the corporation.

LORD ABINGER, C.B.—I see no sufficient doubt in this case to justify me in withholding the order, or in saying, that these tolls are not to be drawn after the lighthouse, as a species of real property. If I am pressed upon that point, I must say, I think this is a chattel real. The parties, however, by the form of their own contract, permitted the lessees to make assignments; and, independently of all other considerations, the act itself gives title to the party in possession, and allows him to turn his interest, whatever that may be, into hard cash. That cuts the Gordian knot. Whatever was the interest of Captain Ellison, by the act of parliament it is converted into money, and becomes his.

Ordered as prayed.

ALDERSON, B. }
Nov. 30, 1837. } HARVEY V. KIRWAN.

Attorney and Client—Privileged Communications.

Letters written by a client to his attorney are privileged communications; and although they may contain matter necessary for the proof of the plaintiff's case, the Court will not enforce their production.

This bill was filed by certain persons, who claimed, as the children of a Mr. and Mrs. Webb, a legacy of 500*l.*, under a will, of which the defendant was the executor and residuary legatee. The defence was, that there was no proof of the marriage of Mr. and Mrs. Webb, and consequently, on failure of such proof, the plaintiffs must be deemed to be illegitimate, and not entitled to the legacy in question. By his answer, the defendant admitted that he had in his possession various documents, &c., relating to the subject of the

suit, and some letters which had passed between him and his solicitor on the subject of the marriage in question; but refused to produce the letters on the ground of their being confidential communications between himself and his solicitor, and, as such, privileged.

This was a motion to compel their production.

Mr. Sharpe, in support of the motion.—The defendant is not only the executor, but the residuary legatee under the will of the testator, and consequently, should the plaintiffs be unable to prove their legitimacy, the defendant will be entitled to the legacy in question. An inquiry has been going on for a considerable time, with respect to the marriage of Mr. and Mrs. Webb, and the defendant has had communications on the subject with his solicitor in Ireland, where it is supposed the parties were married. It is therefore imagined, that these letters, if produced, will afford some clue whereby the fact might be ascertained. As these letters may have no reference to the suit, but only to the fact of the marriage, they cannot be considered privileged communications.

Mr. Fleming opposed the motion.

[*ALDERSON, B.*—Unless they are communications between attorney and client in a suit in which the one is acting professionally for the other, they will not be considered as privileged communications.]

Mr. Sharpe.—An attorney cannot be called upon to give up letters which he may have in his possession, if he thinks they will prejudice the interests of his client, and if they refer to the matter of the suit; but unless they have such reference, a communication to an attorney is not more privileged than a communication to a stranger.

ALDERSON, B.—A plaintiff may search the conscience of a defendant by means of questions put in his bill, but he has no right to go further. Communications between attorney and client must be held to be privileged, or otherwise no man can with safety consult his attorney by letter. When a client asks his attorney a question, he is obliged to state all the circumstances by which the case is surrounded, and which affect the question, or otherwise the attor-

ney would not be able to give a satisfactory reply. I think, therefore, that the plaintiff is entitled to the documents he seeks, but with respect to the letters which have been written by the defendant to his attorney, they must be considered as privileged.

ALDERSON, B. } ATTORNEY GENERAL V. HOL-
Dec. 11, 21. } LAND AND OTHERS.

Charity—Trustee—Information—Costs.

The increase of the annual rental of charity estates from 50l. to 500l., is a sufficient ground for the Court directing a scheme for the future management of the charity, where the testator has not given any specific directions for the application of the increased income, and the number of the objects is not specified.

A, B, C, and D, were co-trustees of a charity under a will, which directed, that one trustee in rotation should be the acting trustee for the current year, and keep the accounts. A, being the acting trustee in a particular year, applied some of the charity funds to his own use, without the knowledge of the other trustees. A. was succeeded by, and delivered his accounts to B, who delivered his accounts in like manner to C, the next acting trustee:—The Court held, that D, was not liable for the breach of trust committed by A.

As the relief granted on an information might have been obtained on petition, the Court refused to give the relators the costs up to the hearing.

The information in this case stated the will of one Edward Hunstone, of Leake, in the county of Lincoln, dated the 3rd of November 1655, whereby he devised all his lands in Leake aforesaid, after the death of his wife, to four trustees, named in his will, and their successors, upon the trusts therein declared, that is to say, first, that all such decayed gentlemen as could make it appear unto his said trustees, that they were of his name and family, and of the age of forty years, or else so impotent as not otherwise able to get a living, should be allowed by his said trustees, out of the rents of his said lands, the sum of 10l. by the year, so far as the rents of the said

lands would extend, for and during their natural lives, the contrary not being occasioned by any extravagancy in their persons. Also, in case it happened there should not be so many of his name and family so being qualified as aforesaid, capable of receiving the said yearly pension, that then such gentlemen as should make it appear to his trustees to be of the family of the Godneys therein mentioned, and so qualified as aforesaid, should be made capable in like manner of receiving the said allowance, as aforesaid. Also, in case the said two families of the Hunstones and Godneys should become extinct, or be reduced to some few persons, not so many as the estate would afford the said allowance unto, that then persons of the family of Robert Smith, or of the Woodliffes, therein respectively described, should have the allowance before mentioned, so far as the estate would extend. Also, that if there were not so many persons, both by affinity and consanguinity to be found, as might have allowance out of his estate, as aforesaid, that then, such person or persons living in the said county of Lincoln, as could make themselves appear to his said trustees to be gentlemen, or persons of quality and merit, and so qualified as aforesaid, should have the same allowance before mentioned, so far as the said estate would extend. And the said will, after providing for the management and conduct of the said charity, so far only as the dress and the moral conduct of the objects were concerned; and directing that there should always be four trustees of the said charity, and enabling the survivors to appoint new trustees, provided, that on his trustees' entrance upon his said estate, as aforesaid, the senior by election amongst them should, for the first year, be both receiver and expeditor of the profits of his said lands, for the uses and behoofs thereinbefore mentioned, allowing him yearly such reasonable charges as he should expend in discharge of the said trusts, and 5*l.* for his pains: provided, that within one month after the expiration of the said year, he should pass his account for the said year, unto the residue of the trustees, or the major part of them, who were thereby desired, upon reasonable notice and warning given unto them by the

said receiver and expeditor, to attend at some convenient place for the taking up of the same, and should have allowed them out of the said accounts at the taking up of them, a dinner not exceeding 20*s.* And so the next trustee, according to seniority of election, should take upon him the same trust of receiver and expeditor for the following year, in manner and form, and to the intents thereinbefore mentioned, and so successively for ever. And further, the said testator's will was, that if any of the trustees should, by any means whatsoever, perfidiously betray the trust thereby reposed in them, or convert the same to any by-end whatsoever, upon due proof thereof to be made unto the rest of his trustees, or the major part of them, it should and might be lawful to and for the residue of his said trustees to expel and eject the said trustee from his trust, and to elect and choose another in his stead, of the same qualifications thereinbefore mentioned, in like manner as they ought to have done in case he should have died; and the said trustee so elected in his stead, should have the same power and trust committed to him as the several trustees had, which were by the said will nominated, viz. Joseph Whyting, Charles Rushworth, Francis Empson, and William Ross.

The information further stated the death of the testator, and that certain lands had, at different times, been allotted to and purchased by the said charity, and that such lands had increased considerably in value, and consisted principally of a farm-house and buildings, and between 300 and 400 acres of arable and pasture land, worth to let at the sum of 30*s.* per acre; and that the said charity estates then produced, or if properly managed would produce, an annual income of from 600*l.* to 700*l.* And after further stating that the defendants George Holland, John Holland the younger, Richard Simpson, and William Cook, were then the trustees of the charity estates, but that no conveyance of the estates had ever been made to them, and that the legal estate in the premises was then outstanding, in some person or persons unknown to his Majesty's Attorney General, contained the following allegations:—"That the said George Holland,

John Holland, jun., Richard Simpson, and William Cook, are now, and have for a great number of years, by themselves, or their solicitor or agent, (who is a relation both of the said William Cook and of the said John Holland,) been in the receipt of the rents and profits thereof, for some such charitable purposes as in the said will mentioned. That between the years of 1814 and 1823, Edmund Hunnings, one of the then trustees of the said charity, with the consent, or through the negligence of the said George Holland, who was then a trustee of the said charity, applied a sum of 156*l.* 17*s.* 9*d.*, part of the funds of the said charity, to his own use; and his Majesty's Attorney General has not been enabled to ascertain in what way the remainder of such rents and profits have been applied and disposed of. That for a great number of years, there have been few or no persons of the family of the testator, or of the other families hereinbefore named, who are proper objects of the said charity; and it is alleged, that there has been considerable difficulty in ascertaining what persons, not being of the aforesaid families, but resident in the county of Lincoln, are proper objects of the said testator's bounty; and that, in fact, no attempt has been made to devote any part of the said income for the benefit of gentlemen, or persons of quality and merit, being in the county of Lincoln, and qualified as in the said will mentioned; and the said rents and profits have remained unemployed, or have been accumulated by the trustees, and laid out on different securities; and that few persons now receive any benefit from the said charity; and his Majesty's Attorney General has not been enabled to discover the particular qualifications of such persons that entitled them to the said charitable relief; and there is now a considerable yearly surplus of the said charity income, after making such few allowances as aforesaid. That it will be beneficial that a proper scheme should be formed for the due application of the said charity income for the time to come, and that proper accounts should be taken of the rents and profits of the said charity estates, and that inquiry should be made into the circumstances under which the said charity estate has become vested in the present trustees,

or in whom the same now is vested, or in whom the legal estate of the said premises is; and that, if necessary, new and additional trustees should be appointed, and the said premises conveyed to them accordingly; and that the said charity should be regulated in general by a decree of this Court."

The defendants, by their answer, admitted the improvement in the value of the charity estates, but stated that 500*l.* was the utmost rent that could be obtained for them; that no conveyance of the premises had been made to them; and with respect to the breach of trust committed by Hunnings, the statement in the answer was as follows:—"That Edward Hunnings was a trustee and secretary of the charity, from the year 1814 to the year 1823; and that in or about the year 1818, he sold out a sum of 200*l.* 3*l.* per cent. consolidated annuities, which was then standing in his name, as the survivor of the trustees, in whose names the same had been originally invested, and that he received the proceeds of such sale, amounting to the sum of 159*l.* 17*s.* 6*d.* That George Holland was a trustee of the charity at the time of such sale, but that the said Edward Hunnings was at that time the secretary of the said charity, and that all the funds passed through his hands alone. That George Holland had not any notice of such sale at the time thereof; but at the next general meeting of the trustees, after the sale, he ascertained that such sale had been made; and that, after such sale had been made, the same also became known to the other trustees of the charity for the time being. That as Edward Hunnings had continued duly to pay the interest on the said stock, and was a man of great respectability and reputed wealth, the trustees for the time being did not compel the said Edward Hunnings to replace the said stock. That, in the month of November 1820, it was ascertained that Edward Hunnings was then insolvent. That at the time of his insolvency, he had in his hands other monies belonging to the charity, which, together with the produce of the sale of the said sum of 200*l.* stock, amounted to the sum of 470*l.* 13*s.* 3*d.* That the dividend upon his estate produced the sum of 313*l.* 15*s.* 6*d.*, which was received by the trustees

for the time being, so that the loss to the said charity, by the insolvency of the said Edward Hunnings, amounted to the sum of 156*l.* 17*s.* 9*d.* That these defendants know not, nor can set forth, as to their belief or otherwise, how Edward Hunnings applied the said sum of 470*l.* 13*s.* 3*d.*: but that he did not apply the same, or any part, to his own use, with the consent or through the negligence of the defendant George Holland. That, up to the time of the insolvency of the said Edward Hunnings, the defendant, George Holland, always believed that the said Edward Hunnings was ready, and willing, and competent to pay and apply, for the purposes of the said charity, whatever he had in his hands belonging to the said charity."

The answers positively denied all the charges contained in the information relative to the mismanagement and misapplication of the charity monies by the trustees, and stated that the whole of the rents had been duly applied for the benefit of proper objects of the charity; but that the families in the will particularly named, had for several years past become extinct, and there was only one person of the name of Woodliffe known to the trustees, who was entitled to, and was in the receipt of an allowance from the charity; but that there had not been any difficulty in ascertaining what persons, not being of the aforesaid families, resident in the county of Lincoln, were proper objects of the said charity, and that the trustees had from time to time appointed from such persons, a sufficient number who were in their judgment qualified to partake of the testator's bounty, and that the whole of the income arising from the charity estates had been duly applied.

It appeared from the evidence, that the trustees had applied some portion of the charity monies in binding out children as apprentices, but in all other respects the case so far as it sought to affect them for mismanagement of the charity, wholly failed. It appeared also from the books, that Hunnings was succeeded in his situation as acting trustee by John Holland, jun., who adopted Hunnings's accounts; and in 1821 William Holland adopted the account, and he, in stating his account, left himself a debtor to the estate in the sum of 470*l.*

13*s.* 3*d.*, which included the sum left in Hunnings's hands by William Holland.

Mr. Cooper and *Mr. Spurrer*, for the relators.—Notwithstanding the non-conveyance of the legal estate, it is not sought to question the validity of the acts of the successive trustees of this charity. It must, however, be referred to the Master, to ascertain what has become of the legal estate, and to ascertain whether the trustees have been duly appointed for the purpose of an equitable administration of the trusts of the will. If the Master shall find that the trustees have not been properly appointed, it will be necessary for the Court to exercise the powers vested in it by the 1 Will. 4. c. 60. s. 23. The important question for the consideration of the Court is, as to the future management of the charity. If the founder had laid down particular rules for its government, this Court undoubtedly could not interfere; but, as he has omitted to make special provisions, and has not vested in the trustees a discretion to deal with the trust property, according as change of circumstances from time to time requires, the Court is necessarily called upon to administer the charity, and for that purpose to direct a scheme. In *The Attorney General v. the Mercers' Company* (1), the increase of the funds of the charity, and the alteration in value of money since the date of the wills, were held to be a sufficient ground for the Court's interference, and to justify an increase of the loans directed by the testators' wills from 200*l.* to 500*l.* So also in *The Attorney General v. the Earl of Clarendon* (2), there being a surplus income, the application of which was partly specified by the founder's rules and partly left to the discretion of the governors, and it appearing that the application of the income was not, in all respects, agreeable to the direction of the founder, the Master of the Rolls thought it fit, that it should for the future be fixed and ascertained by a scheme, having due regard on the one hand to the founder's directions, and on the other, to the alteration of circumstances that might have taken place since his time, and which might be such as to render literal adherence to his rules

(1) 3 Myl. & K. 654.

(2) 17 Ves. 500.

adverse to their general object and spirit. Although it must be confessed, that in many respects the conduct of the trustees of this charity cannot be complained of, yet their management has been in other respects highly culpable. The monies of the charity have been lent to the trustees themselves, and the testator's bounty has been extended, contrary to his express directions, to persons under forty years of age, and even to infants; and one of the trustees has been allowed to sell out a sum of stock, and to convert it to his own use, and has since become insolvent. True it is, that these charges affect the former trustees rather than the present; nevertheless they form a ground for the Court's taking into its hands the administration of the charity; and so far as the sale and conversion of the stock is concerned, the present trustee, George Holland, is clearly liable. Notwithstanding that the will directs, that the election of the expeditor of the charity funds should be annual, and that the property should always be held by four trustees, it is admitted, that Edward Hunnings continued to be the acting trustee and secretary from 1814 to 1823, and that at the time when the stock was sold out by him, it was standing in his name alone. The defendant George Holland was a trustee at the time, and although it is alleged, that he was ignorant of the circumstance at the time, yet it is clear, that he was informed of it very shortly afterwards, and then, instead of removing Hunnings from the trusteeship, or at all events from the office of expeditor, and requiring an immediate restoration of the stock, he is allowed to retain the money, paying interest thereon until 1820, when he became insolvent; and even after this, he was allowed to continue as trustee or secretary till the time of his death. The estate has, through the acquiescence of the defendant George Holland, and his co-trustees, sustained a loss of the sum of 156*l.* 17*s.* 9*d.*, for which the former is clearly responsible. See *Adair v. Shaw* (3), *Brice v. Stokes* (4), *Caffrey v. Darby* (5), and *Ex parte Angel* (6); and this, notwithstanding the other parties, who were

participants in the breach of trust, are not before the Court. See *Walker v. Symonds* (7).

Mr. Simpkinson and Mr. Koe, for the defendants.—This information has been filed without any ground whatever; and the mere circumstance of the legal estate being outstanding, does not afford any justification. If it were necessary that the legal estate should be got in, that might have been effected by a simple petition, under the authority of the act 1 & 2 Will. 4. c. 60, and not by the lengthy and expensive proceedings of an information. All the charges, as to misconduct and mismanagement, on the part of the trustees, have reference to a period long since past, and to a state of things which has been completely rectified. Not a single charge can be made against, much less brought home to the present trustees, except the alleged breach of trust, in respect of the sale of the 200*l.* stock, and the consequent loss to the charity of 156*l.* 17*s.* 9*d.*, with which the defendant, George Holland, is sought to be charged. Now, it is admitted that George Holland knew nothing of the sale till some time afterwards, and that he derived no benefit from it; but, nevertheless, the Court is called upon to hold him liable, merely from the circumstance of his being a trustee at the time the sale took place, and this too in the absence of his co-trustees, who, if any breach of trust has been committed primarily, were greatly, or at all events equally, liable. As the Court has already intimated, it is necessary for the informants to prove wilful negligence on the part of the defendant Holland, but this they have wholly failed to do. It is expressly directed by the testator's will, that each acting trustee should account to his successor; and, therefore, John Hunnings, jun., who succeeded Edward Hunnings, and who adopted the account of the latter, was the party liable for the breach of trust. In the case of *Walker v. Symonds*, which has been cited by the other side as an authority for the position that it is not necessary that all the trustees implicated in a breach of trust should be parties to a suit, in which one of them is sought to be charged, the point did not

(3) 1 Sch. & Lef. 280.

(4) 11 Ves. 319.

(5) 6 Ves. 488.

(6) 2 Atk. 162; s. c. Burn. 423.

(7) 3 Swanst. 1.

arise; and Lord Eldon's observations only amount to an *obiter dictum*, as the representatives of the deceased trustee were in that case actually before the Court. Besides, that dictum has never been followed, but, on the contrary, has been expressly disapproved of by Sir John Leach, and recently by the present Vice Chancellor, who stated, that there was some mistake on this point, in the report of the case in *Swanston*. The Court cannot, therefore, act upon that dictum. As then all the charges of mismanagement, and even of laches, on the part of the present trustees, have entirely failed, what ground is there for the Court's directing a scheme for the future management of the charity? The trustees have a discretion in the selection of objects of the charity, and the allegation contained in the information, that a difficulty has existed in finding and selecting proper objects, is denied by the answer, and as it is not pretended that any other ground for the Court's directing a scheme exists, the information must be dismissed, with costs. In *The Attorney General v. the Grocers' Company*, an information which had been framed improperly, in the same respect as the present, was dismissed, with costs, although it was a case in which some relief might have been granted, if it had been properly brought before the Court.

Mr. Cooper, in reply, cited—

The Attorney General v. Brooke, 18 Ves. 324.

The Attorney General v. Scott, 1 Ves. sen. 417.

The Attorney General v. Foyster, 1 Anst. 116.

The Attorney General v. the Mayor of Stamford, 2 Swanst. 599.

The Attorney General v. Whiteley, 11 Ves. 241.

The Attorney General v. Jeanes, 1 Atk. 355.

as shewing that the Court would grant proper relief under the prayer for general relief, notwithstanding that the specific relief prayed by the information might be improper; and distinguished the case of *The Attorney General v. the Grocers' Company* from the present; because, in that case, the defendant insisted on a decree of the Commissioners of Sewers, which the Master of the Rolls had no jurisdiction to vary. The

case of an information is very different from that of a bill, where all facts, in respect of which relief is sought, ought to be put in issue, otherwise the defendants may be taken by surprise; but in the former proceeding, it is only requisite to shew generally the necessity of the Court's interference, and it will take the whole of the affairs of the charity into its management.

Dec. 21.—ALDERSON, B.—This was an information filed against the defendants, who are trustees of a charity in the county of Lincoln, originally founded by the will of Edward Hunstone, in the year 1655.

The information, after setting out the will of the founder, proceeds—first, to charge the defendants with mismanagement of the charity estate, in various particulars, to which it is not necessary that I should advert;—secondly, with having suffered the legal estate in the premises to be outstanding; and, thirdly, with mismanagement of the charity generally; and it charges one of the defendants, Edward Holland in particular, with a breach of trust, in respect of a sum of money, amounting to upwards of 150*l.*, lost to the charity by the failure of one of the existing trustees, of the name of Hunnings.

The information prays, that George Holland may be directed to repay this money; and that the Court will direct the matter to be referred to the Master, to consider of a scheme for the future management of the charity, together with such relief as may be proper under all the circumstances. The first charge was given up; it appearing quite clear on the evidence, that the charity estate had been managed greatly to the advantage of the charity. And as to the mismanagement of the charity itself, there is nothing before the Court to support that allegation against the present trustees. They appear to me to have conducted themselves with great propriety, and, so far as the evidence goes, to have appointed proper objects to receive the bounty of the founder. I see no reason to charge Mr. Holland with any breach of trust, as to the money lost by the failure of Hunnings. The utmost that could be urged against him was, that he was not so prompt as he might have been to compel Hunnings to replace the money arising from the stock sold out.

But it is clear, that as soon as he became the acting trustee in rotation, the money, as much at least as could be recovered, was replaced; and that Hunnings previously had been considered a man in perfect good credit. If any complaint could fairly be made at all, it would apply to the trustee who preceded George Holland in office, and who is no party to the present record. On the whole, I am quite satisfied, that all these which are the most important charges against the defendants have totally failed. But then it is, I think, made out, that the legal estate is outstanding, and that some inconvenience may possibly result to the charity, if that were suffered to continue, though, I own, I think the inconvenience is not likely to be very great, since no instance of it has occurred from the time of the death of the original trustees (which must have taken place more than a century ago), to the present day. But there is another circumstance in this case. The information prays a reference to the Master, to consider of a scheme for the future management of this charity. It appears that, by the will of Mr. Hunstone, he directed his charity to be for the benefit of such decayed gentlemen as can make it appear unto his trustees, that they are of his name and family, and of the age of forty years; or else so impotent as not to be otherwise able to get a living. Such persons as these (and they are afterwards extended on failure of his own family, to the families of Godney of Bagenderby, Smith of Saltflete, and Wordliff of Toft Grange, successively; and, lastly, on failure of all these, to such persons being inhabitants of the county of Lincoln, at large,) are to have each an allowance of 10*l.* a year for life, in case of good conduct. And the number is to depend on the amount to be derived from the estate.

Now, from the evidence, it clearly appears, that the estate has increased from an annual rental of about 50*l.* to that of 500*l.*; and it is obvious, that the amount mentioned in the will, 10*l.*, although at that time a decent allowance for a decayed gentleman, is now, from the change in the value of money, a totally inadequate sum for that purpose; and that the retaining of the present amount will, in truth, violate the spirit, whilst it is an adherence to the

letter of the will. It appears, moreover, that in former times, though not of late, an improper interpretation has been given to the word "impotent," in the will, which seems to have been construed so as to allow the admission of minors, until they attained their majority, to the benefits of the charity. This interpretation is clearly erroneous, and was admitted to be so. The word "gentlemen" also, is a word of somewhat vague meaning; and it will be well, therefore, to give some more accurate description of it; at all events, enumerating some classes, so as to make the objects of the charity more definite, and the duties of the trustees more easy in future. Although, therefore, I am not insensible to the argument which was urged, as to the expense of a scheme, yet, I think, on the whole, it would clearly be more for the benefit of the charity, that a reference to the Master should take place.

The case of *Morden College*, before Lord Cottenham, is an authority for my doing this. But neither this, nor the getting in of the legal estate, required the present information to be filed, containing grave charges, which turn out to be wholly without foundation. Both these objects might have been obtained by petition. I propose, therefore, to adopt the decree, which under very similar circumstances, Lord Langdale made in *The Attorney General v. Cullum* (8). "Thinking," as he said in this case, "that the suit had been instituted and conducted in a manner to create a great deal of unnecessary expense, I think it right to frame my decree in terms to save the charity estate from costs, to which I think it ought not to be subjected." I dismiss, with costs, so much of the information as relates to the mismanagement of the estate and of the charity, by the present trustees, and of the breach of trust alleged against George Holland. I direct a reference to the Master as to the legal estate, to inquire whether it be outstanding, and to take proper measures for getting it in. I direct a reference to him to consider a scheme for the future management of the charity, in which, amongst other things, he is to consider whether the

(8) 1 Keen, 111; s. c. 5 Law J. Rep. (N.S.) Chanc. 220.

amount paid to each of the objects of the charity should not be increased, and their number diminished, without, however, disturbing any of the present possessors. The Master is also to consider the expediency of increasing the number of the trustees, by introducing one or two of the incumbents mentioned in the testator's will, and the propriety of prohibiting, in future, the election of trustees in the same family. He will also consider how to define the word "gentleman" more clearly—as, for instance, by stating, that magistrates, esquires, members of the three learned professions, graduates of the universities, attornies, surgeons, apothecaries, and the like, shall be considered, if otherwise eligible, objects of this charity. He will also define the age at which eligibility is to begin, so as to exclude minors in future. I mention these circumstances as some of those which are proper to be considered. Upon the exclusion of minors, and upon the not disturbing of the present trustees, and the present objects of the charity, I wish to be considered as giving a direction to the Master. And as to the costs of the parts of the information not dismissed, I give none to the relators up to the present time. The defendants' extra costs as to the parts dismissed, and their own costs up to the present time, they are to have out of the charity estates. The subsequent costs I reserve, intimating, however, my wish that the Master (if there be any improper delay or vexatious proceedings before him, which, however, I do not anticipate,) will report the same, for my government, as to the award of these costs on further directions.

Decree accordingly.

C.B. }
Nov. 18, 1837. } DOMVILLE v. BERRINGTON.

Vendor and Purchaser—Sale—Opening Biddings.

An advance of 5l. per cent. is sufficient for the purpose of opening biddings.

In this suit, which was for the purpose of foreclosing a mortgage, the estate had been sold before the Master in lots, and one of the lots was purchased for the sum

of 7,300l. A motion was now made on behalf of the mortgagee to open the biddings for this lot, and that the mortgagee might be at liberty to bid at the sale.

Mr. Coleridge, in support of the motion, —The proposed advance is 365l., being 5l. per cent., upon the original purchase-money; this has been held to be a sufficient advance for the purpose—*Lawrence v. Halliday* (1). Another ground for the motion is, that the purchaser of this lot is the solicitor of one of the parties, and therefore incapacitated from buying under the sale: this alone is a sufficient reason for vacating the sale.

Mr. Whitworth, for the purchaser.—5l. per cent. is not a sufficient advance to authorise the Court to open the biddings—*Garstone v. Edwards* (2). The mortgagee might have obtained leave to bid at the sale in the first instance, and the Court will not on that ground entertain this application. At all events, if the Court allows him to open the biddings, he ought not to be trusted with the conduct of the sale.

The LORD CHIEF BARON.—The estate having been sold, the present application is made by the mortgagee for a resale, and for liberty to bid. The objection to this is, that he ought not to have the conduct of the sale, as he would be then both buyer and seller, and I think that this is reasonable. The mortgagee has little inducement to exert himself about the sale, as his interest is safe, although the estate may not fetch more than a certain sum. I shall order the biddings to be opened, but the Master must direct how the sale shall be conducted, and to which solicitor it shall be intrusted.

Ordered accordingly.

ALDERSON, B. }
Jan. 11, 1838. } CHILDS v. WILSON.

Legacy—Construction of Will—Intestacy.

A, by his will, bequeathed to J. W. and J. B., for his wife and daughter, the whole of his property, but afterwards added the fol-

(1) 6 Sim. 296.

(2) 1 Sim. & Stu. 20.

following words, "namely, I give to my wife 50*l.* a year for her life, and 500*l.* to my daughter at twenty-one."—Held, that after payment of the 50*l.* a year to the widow, and 500*l.* to the daughter, there was an intestacy as to the residue, and that the daughter, as heiress-at-law, was entitled to two-thirds thereof.

J. Browne, by his will, bequeathed as follows:—"I give and bequeath to Mary Browne, my wife, all my household furniture in my dwelling-house at Sundridge; also, to John Wilson and J. Browne, for my wife Mary Browne, and my child Mary Anne Browne, all my money, goods, and chattels whatsoever, except my household furniture aforesaid; namely, I give to Mary Browne 50*l.* a year for her life, and to my daughter Mary Anne Browne 500*l.* when she attains twenty-one. And in case my wife Mary Browne shall be pregnant at my death, the child to have 500*l.*, and my wife to have 25*l.* per annum, instead of 50*l.*, as aforesaid." His wife and daughter survived him. The former was not pregnant at the time of his death. She afterwards married Childs, the plaintiff. The cause having been heard and decided, and having come before the Court on further directions, it was decreed that the mother and daughter were entitled to the residue after payment of the annuity of 50*l.* to the mother, and the 500*l.* to the daughter, but there was no declaration in what shares they were each to take.

This was a petition on behalf of Mary Anne Browne, the infant daughter, asking for a declaration that she was entitled to two-thirds of the residue, as being undisposed of by the will, her mother, Mary Childs, being entitled to the other third; it prayed also for the appointment of a guardian.

Mr. Hayter, in support of the petition.—Under the Statute of Distribution, the petitioner, as heiress-at-law to the testator, is entitled to two-thirds of the residue, there being here an intestacy upon the will.

Mr. H. Twiss, for Mary Childs, the mother.—The question turns on the word "namely," and whether what follows supercedes the construction, as regards the residue, and for which it is contended, that it was the intention of the testator to

give to each an equal interest. If not, then the general rule will apply, namely, that the Court leans against construing a partial intestacy, and will not resort to the Statute of Distribution, if the making of a complete disposition can be gathered from the will.

Mr. Hayter replied.

ALDERSON, B.—If the words of the will, when taken simply, are clear, and lead to no absurdity, it is proper to advert to their literal meaning. Now, there is no absurdity in thinking that the testator did not mean to devise the whole of his property. He first, in general words, bequeaths the whole of his property, and then qualifies his bequest by the word "namely;" in other words, by saying, "I give 50*l.* a year to my wife, and 500*l.* to my daughter at twenty-one." If so, there must be an intestacy as to the rest.

C.B. } KEYS v. WILLIAMS.
Jan. 16, 1838.

Equitable Mortgage—Lien—Evidence—Answer.

A. being indebted to B, to prevent legal proceedings for the recovery of the debt, agreed, as a security, to execute a mortgage to B. of a certain estate of which he was possessed, and for the purpose of preparing such mortgage, he deposited with B.'s solicitor the title-deeds of that estate:—Held, that such deposit amounted to an equitable mortgage.

The evidence of a single witness, supported by a memorandum, made by him at the time, in the presence of the defendant, and by a letter of the defendant, is sufficient to contradict the answer of the defendant.

George L. Williams, the defendant, being indebted to one John Burrell in the sum of 400*l.*, on the 3rd of August 1833, executed to him a bond to secure the repayment of that sum, with interest. On the 10th of July 1834, Williams repaid 50*l.* of the principal. Burrell afterwards called in the money with interest, and Williams being unable to pay it, the plaintiff, George

Thomas Keys, advanced it for him to Burrell, who assigned to Keys his interest in the bond and interest, by a deed bearing date the 29th of March 1836. In the month of April following, the solicitors of the plaintiff wrote to the defendant pressing for payment of the money by a certain day, or for a proper security. In consequence, the defendant, on the 13th of April, called on the solicitors of the plaintiff, proposing a security for their acceptance, and leaving in their custody certain deeds of lease and release, conveying lands at Shenley, in Hertfordshire; and, on the following day, finding that his proposition was not acceded to, he made a further offer, which was accepted; and, on the same day, a policy of insurance for 1,000*l.*, on the life of the defendant, was left by him with the plaintiff's solicitors.

The bill stated the proposition of the defendant to be, "that he would execute to the plaintiff a mortgage of the land at Shenley, and an assignment, by way of mortgage, of the policy of assurance, and likewise a warrant of attorney; and that he would pay the whole sum of 350*l.* and interest, in October 1836; and that the title deeds of the above premises, and also the policy of assurance, should be a security for the said sum, until the mortgage should be executed;" and after alleging that the plaintiff's solicitors had prepared the drafts of the mortgages and warrant of attorney, which the defendant refused to execute, and a large arrear of interest remained due, prayed the usual account, and in default of payment, for sale of the freehold premises and policy, and payment thereunto, or otherwise an absolute conveyance and assignment of the freehold premises and policy to the plaintiff; or in case the Court should be of opinion that the plaintiff was not entitled to such relief, then that the defendant might be decreed to execute to the plaintiff a good and sufficient mortgage and assignment, by way of mortgage, of the freehold premises and policy, together with a warrant of attorney, for securing to the plaintiff repayment of the debt and interest.

The answer of the defendant denied that he made any proposition to execute a mortgage for payment of the money in

October 1836, or to execute any warrant of attorney. His proposition was, that he would execute a mortgage of the freehold premises, and policy of insurance, so as to secure the payment of the debt and interest to the plaintiff at the end of three years, and not before; and denied that the title deeds and policy had been left with the plaintiff's solicitors for any other purpose than for carrying such proposed mortgage into execution.

The solicitor of the plaintiff, in his evidence, after stating the proposal by the defendant, of the 13th of April, and the leaving of the title deeds of the Shenley estate in his custody, deposed, that he had a conversation with the defendant on his calling at his (the solicitor's) office on the 14th of April 1836, and he then explained to the defendant that the plaintiff would not accede to his proposal, and handed back to the defendant his deeds, and informed him that the instructions of his (the solicitor's) partner and himself from the plaintiff were, to proceed immediately to enforce payment of the bond and interest, and requested a reference to defendant's solicitor; whereupon the defendant said he would give a mortgage of the estate at Shenley, and his life policy, payable in the next October; and added, that he would give a warrant of attorney to secure payment to the plaintiff in October, and due payment of the premium on the policy; and he took down his proposition in writing at the time, and in the presence of the defendant, which memorandum was produced. That the deeds of Shenley were left with him as a temporary security, and for the purpose of preparing the mortgage securities, in the event of the plaintiff acceding to his proposition; and the defendant also promised to bring him the policy of assurance, if the plaintiff should accede to the arrangement. He made a minute in writing at the time of this proposition, and communicated the particulars of it to the plaintiff, who called at his office in consequence of his (the solicitor's) letter communicating the first offer, when he read to the plaintiff the defendant's further proposition, which the plaintiff accepted, and directed him to inform the defendant of it, which he did. A letter, from the defendant

to the plaintiff, corroborative of this, was put in evidence, dated the 16th of April 1836, in which was the following paragraph:—"As I am to pay the expense of a mortgage, allow it to be made in the usual way, for one year; and with an understanding between us, that I may pay it off before if I please. I do hope there will require no registry for the policy."

Mr. Simpkinston and Mr. Willcock, for the plaintiff.—The question for consideration is, whether the circumstances of the case are such, that the Court will decree to the plaintiff a sale or a foreclosure of the estate of Shenley. The evidence clearly shews that the defendant agreed to grant a warrant of attorney to secure payment to the plaintiff in six months, and that the deeds were deposited with the attorney, not merely as instruction, but as an equitable mortgage to secure the payment in the meantime. An agreement to mortgage, with a subsequent delivery of the title-deeds, will amount, in equity, to a mortgage, and will be effectual from the time of the agreement—*Edge v. Worthington* (1). In *Ex parte Bruce* (2) it was held, that an equitable mortgage was created by delivery of deeds for the purpose of preparing a legal mortgage. Here, the deeds were left for the purpose of preparing a legal mortgage, and as a security for money lent; and although the evidence in support of the plaintiff's case is that of an individual only, yet his evidence is corroborated by the memorandum in writing, taken at the time, and by the letters which passed. It seems perfectly clear, that the plaintiff is entitled to a decree for a sale.

Mr. Spurrier for the defendant.—The defendant denies every part of the statement as to the warrant of attorney, and of the deeds being placed with the attorney as an equitable mortgage, or for any other purpose than to prepare a mortgage for three years, and that there was any other proposal than for that period.

[*LORD ABINGER, C.B.*—His own letter requests that the mortgage may be made in the usual way, for a year.]

The letter of the 16th of April was not

stated in the original bill; these circumstances are only brought forward in the amended bill. The testimony of one witness, unsupported by other testimony, cannot be received in contradiction of the defendant's answer. It is clear, that these deeds were deposited with the plaintiff's attorney for no other purpose than for instruction, not as a deposit by way of security for the debt, but for the purpose of preparing a mortgage deed; and therefore the transaction does not amount to an equitable mortgage. In *Brander v. Boles* (3), the Court decided, that the mere depositing of deeds with a solicitor for the purpose of preparing a mortgage, does not amount to an equitable mortgage. There, B. having contracted a debt with defendant, proposed to mortgage his estate to him as a security, and left his title deeds with his attorney to prepare the mortgage; but the attorney died before it was done. Afterwards, defendant carried the deeds to another scrivener for the same purpose, but before he had prepared the mortgage, B. became bankrupt, and plaintiff, as his assignee, brought a bill to have the deeds delivered up, and the estate sold for the benefit of the creditors, which was decreed. In *Brizick v. Manners* (4), A, on an account stated, owed B. 400*l.*; A. agreed to give a bond for 100*l.*, and to secure the remaining 300*l.* by mortgage. A. delivered a deed of conveyance to C, an attorney, who took instructions to draw the mortgage; but before the bond or mortgage was executed, A. died. Though this agreement by parol was proved, yet, on a bill brought against the heir of A, the Court refused to carry them into execution. So, also, in *Ex parte Bulleel* (5), it is laid down, that the delivery of title-deeds to an attorney to prepare a mortgage deed, does not amount to an equitable mortgage; it is otherwise if deposited expressly as a security for a debt. In the cases where the transaction has been sustained as an equitable mortgage, there was an express pledge of the title deeds as a security for the money; but in *Russell v. Russell* (6), the pledge of a lease

(1) 1 Cox, 211.

(2) 1 Ross, 374.

(3) Prec. Chanc. 375; s. c. Gilb. Eq. Rep. 35.

(4) 9 Mod. 384.

(5) 2 Cox, 243.

(6) 1 Bro. C. C. 269.

was carried into effect against the assignees of a bankrupt. But Lord Eldon disapproved even of those cases, and regretted that the doctrine of equitable mortgages had ever been established, and was of opinion that it ought not to be extended—*Ex parte Hooper* (7), *Ex parte Whitbread* (8). In *Norris v. Wilkinson* (9), the lien, by possession of the title-deeds, was disapproved, and was not to be extended, with reference to the Statute of Frauds: and it failed, the deeds being delivered, not as a present immediate security, but for the purpose of having a mortgage security created. The case of *Ex parte Bruce* is at variance with the other authorities. The cases shew, that the only diversion allowed from the Statute of Frauds, is where the deeds are deposited for a present advance of money; where they are deposited for any other purpose it will not do. Here, there is nothing to shew that an equitable mortgage was intended; but even if the deposit of the deeds should be so considered, that will not extend to the policy of insurance. This Court, therefore, will not give relief where the deeds are deposited only for the purpose of preparing a mortgage.

Mr. Simpkinson, in reply.—The Court will judge as to the probabilities of the evidence on either side; and, although the general rule is, that one witness shall not prevail against the answer, yet, when that witness is supported in his evidence, as he is here, by the memorandum and the letter of the 16th of April, which has not, and cannot be explained away, that for the plaintiff must predominate. In *Spurrier v. Fitzgerald* (10), it was held, that a bill, alleging a written agreement, might be sustained by evidence of a parol agreement. As to the terms on which the mortgage was to be granted, the statement of the defendant has been satisfactorily impeached: it has been most clearly shewn, that the mortgage was not to be for three years, as stated by him, but for the term of six months only. The proposal was taken down in writing at the time, and is,

in a great measure, corroborated by the letter of the defendant. Then, on the question of mortgage. There is not a word in the answer referring to the Statute of Frauds. It admits an agreement for a mortgage. The earlier cases, which have been cited, went on a principle which does not prevail now—viz. that there could be no equitable mortgage by a mere deposit of title deeds, unless that deposit was accompanied by a writing. The first case which established a contrary proposition was *Russell v. Russell*. As the law stands at present, there is no difference between a deposit by way of an equitable mortgage and one to have a legal mortgage prepared at law: the party could not recover the deeds, without payment of the money. The case of *Edge v. Worthington*, which was followed by that of *Ex parte Bruce*, was not reported when *Norris v. Wilkinson* was decided, which decision went on the supposition, that there was no authority for the proposition now contended for.

Jan. 16.—LORD ABINGER, C. B.—The doctrine of equitable mortgages has been said to be an invasion of the Statute of Frauds, and, no doubt, there was great difficulty in knowing how to deal with deposits of deeds by way of security after the passing of that statute. But, in my opinion, that statute was never meant to affect the transaction of a man borrowing money, and depositing his title deeds as a pledge for payment. A court of law could not assist such a party to recover back his title deeds by an action of trover; the answer to such an action being, that the title deeds were pledged for a sum of money, and that, till the money is repaid, the plaintiff has no right to them. So, if the party came into equity for relief, he would be told, that, before he sought equity, he must do equity, by repaying the money in consideration for which the deeds had been lodged in the other party's hands. The doctrine of equitable mortgages, therefore, appears to have arisen from the necessity of the case. It may, however, in many cases, operate to useful purposes, and certainly is not injurious to commerce. In commercial transactions, it may be frequently necessary to raise money on a sudden, before an oppor-

(7) 19 Ves. 477; s. c. 1 Mer. 7.

(8) 19 Ves. 209; s. c. 1 Rose, 399.

(9) 12 Ves. 192.

(10) 6 Ves. 548.

tunity can be afforded of investigating the title deeds, and preparing the mortgage. Expediency, therefore, as well as necessity, has contributed to establish the general doctrine, although it may not altogether be in consistency with the statute. The question here is, whether the circumstances under which these deeds were deposited, lead to any distinction between this case and others, which have been decided on the general doctrine. It has been very ably argued for the defendant, that the circumstance of the deeds having been deposited, not as a present security, but with a view to a future security, gives rise to such a distinction. Certainly, if before the money was advanced, the deeds had been deposited with a view to prepare a future mortgage, such a transaction could not be considered as an equitable mortgage by deposit; but it is otherwise, where there is a present advance, and the deeds are deposited under a promise to forbear suing, although they may be deposited only for the purpose of preparing a future mortgage. In such cases the deeds are given in part of the security, and become pledged from the very nature of the transaction. Then, is there evidence to shew that such was the nature of the transaction in this case? It seems to me, upon a view of the answer and the evidence, that the defendant has been mistaken in many of his statements; and, if so, the general rule as to the rejection of the evidence of one witness contradicting the answer, will not apply. Admitting, therefore, the evidence of the plaintiff's witness, it amounts to this—that, in order to avoid immediate proceedings against him, the defendant made to the plaintiff's solicitor the proposition mentioned in the bill: that such proposition was taken down in writing and read to him: that the deeds were then deposited with the plaintiff's solicitor as a temporary security, with a view to prepare a mortgage; and that afterwards the policy of assurance was deposited with him in the same manner. It may be admitted, that this is but slight evidence; but, still, it is evidence of a deposit by way of security to prevent immediate proceedings against the depositor. If it were necessary to decide the specific point, I should say, that an agreement to grant a mortgage for money already

advanced, and a deposit of deeds for the purpose of preparing a mortgage, is, in itself, an equitable mortgage by deposit; but, here the deposit was evidently made as a present security, as well as with a view of preparing a future mortgage. Upon the whole, it appears to me, that, in default of payment of principal and interest within the usual time, a sale must take place.

Decree accordingly.

C. B. { *Ex parte* THE EARL OF ALBEMARLE in re THE GUILTCROSS UNION.
Jan. 18.

Poor — Costs of completing Purchases under New Poor Law Act.

The Court will, under the statute 5 & 6 Will. 4. c. 69, order the guardians or overseers to pay all necessary costs incurred in completing purchases under the Poor Law Act.

In December 1836, a petition was presented, stating that the guardians of the Guiltcross Union had contracted with the trustees of Lord Albemarle's marriage settlement, to purchase of them certain lands for the purposes of the Union, and that they (the trustees) had agreed to purchase other lands to be settled similarly to those they had contracted to sell, and praying for a reference to the Master to ascertain whether a good title could be made to such lands. The Master reported in favour of the title, and the present petition was for a confirmation of that report, and for the costs of that transaction, which consisted of the costs attending the contract; those of the petition for a reinvestment and reference; those attending the conveyance of the trustees of the settlement, and those of the present application; it being submitted by the guardians that the costs should be apportioned between the parties.

Mr. Malins, for the petitioner.—By the statute 5 & 6 Will. 4. c. 69. s. 2, the Court is enabled "to order the expenses attending such purchase, payment, or application, or any part thereof, to be paid by such guardians or overseers."

LORD ABINGER, C.B.—I think you are entitled to the whole of the costs as prayed for.

Ordered accordingly.

ALDERSON, B. } *Ex parte TATHAM in re THE*
Feb. 14. } LONDON BRIDGE ACTS.

Trustees—Costs—London Bridge Acts.

The costs of sale and application under the New London Bridge Acts, allowed on a petition from one of two trustees, the other being abroad and refusing to act in a trust for sale under a marriage settlement; he being considered under these acts as an "incapacitated person."

Certain freehold tenements in the city of London were, under a marriage settlement, conveyed to trustees, in trust for the separate use of the wife for her life, with remainder for her husband for life, with remainder to the children of the marriage, in such shares as the wife should appoint, with power to sell with the consent of the wife. The wife and four of their children survived the husband and the trustees, the survivor of whom having devised the trust estates to two persons of the names of Parkinson and Tatham, and making the latter his executor. The former refusing to act, and going abroad, Tatham took upon himself the trusts. The premises were afterwards sold by the widow to the corporation of London, for the purposes of the New London Bridge. The widow died in 1837, bequeathing the produce of the sale to the four children. Under the provisions of the statute 10 Geo. 4. c. 136, in consequence of the absence of Parkinson, the conveyance was made to the corporation of London, and the purchase-money paid into court, and invested in the funds in the name of the Accountant General of the Court.

Mr. Tatham now presented a petition on the part of Tatham the trustee, praying that the Attorney General might be ordered to sell stock sufficient to defray the expenses of the sale and of this application, and that the remainder might be transferred, according to their respective shares to the parties interested. In support of

the petition, he referred to the case of *Ex parte Layfield* (1).

Mr. Wood, for the corporation, making no opposition,

The Court made the order as prayed.

C.B. }
April 3. } CAMPBELL v. DICKENS.

Practice.—Certificate of Impertinence.

It is necessary that the Master's certificate of impertinence in the answer, should be confirmed on motion with notice.

On a reference of the answers of some of the defendants, to the Master, for impertinence, and he having reported that they were impertinent, for the plaintiff it was now moved by *Mr. K. Parker*, that it be referred back to the Master, to expunge the impertinent matter, and to tax the costs of the order of reference.

For the defendants, there was a cross motion for liberty to except to the Master's certificate, which motion was founded on special circumstances.

Mr. Webster, for the defendants.—The Master's certificate not having been confirmed, the motion cannot be allowed by the Court—*Ward v. Bottatin* (2), and *Jones v. Green* (3).

LORD ABINGER, C.B.—As this appears to be the practice of the Court, I cannot put it upon a new footing, except by a general order. I must therefore refuse the motion, although I think the practice of the Court of Chancery preferable on this point to that of this Court. In respect to the cross motion, I shall accede to the application, as it appears, without blame in either party, that the defendants have had an opportunity of seeing the Master's certificate.

Order accordingly.

- (1) 1 You. & Col. 79.
- (2) 8 Price, 86.
- (3) 1 You. 269.

ALDERSON, B.
1837,
Dec. 18, 20, 21, 22. }
1838, } SKEFFINGTON *versus*
Jan. 1; Feb. 7. } WHITEHURST AND
OTHERS.

Evidence—Presumption of Release—Descent of Equity of Redemption—Administrator de bonis non.

The entries in the bill of costs of a deceased attorney, held to be good secondary evidence of the execution of deeds.

Release presumed to have been executed in pursuance of covenants contained in a deed of 1791, there not having been any distinct admission of the right of the releasors since that time, and they never having interfered in the premises.

Where the original administrator mortgages a leasehold of his intestate, reserving the equity of redemption to himself and his assigns, and then dies, and after his death administration de bonis non is taken out, the right to redeem belongs not to the administrator de bonis non, but to the representative of the original administrator.

Thomas Hubbert, being possessed of certain leasehold estates, under a lease, dated the 23rd of June 1788, and under an agreement, dated the 21st of January 1790, subject to a lease to Thomas Carter, dated the 11th of October 1785, and being in partnership with his natural son Alexander Hubbert, died in 1790, a bachelor, and intestate, leaving Lady Skeffington and Mrs. Donovan, both married women, his sisters, and next-of-kin, and the said Alexander Hubbert and Thomas Rowcroft, another natural son, surviving him. The present bill was filed by Sir Lumley St. George Skeffington, as administrator *de bonis non*, and as representative of the next-of-kin of Thomas Hubbert, claiming a right to redeem the leasehold premises from the defendants, purchasers from T. Rowcroft.

After the death of Thomas Hubbert, the partnership affairs being found to be embarrassed, by an indenture, dated the 31st of December 1790, made between Alexander Hubbert of the first part, the several creditors of the partnership of the second part, and Thomas Rowcroft of the third part, an arrangement for a compo-

sition of the debts of the partnership was entered into, and Alexander Hubbert and Thomas Rowcroft gave their joint promissory notes for carrying such arrangement into effect; and in consideration thereof, the several partnership creditors released Alexander Hubbert from all claim and demand against him, as surviving partner of the late partnership, and against the heirs, executors, or administrators of the said Thomas Hubbert, deceased, or his separate estate, and they renounced to Alexander Hubbert and Thomas Rowcroft, and each of them, all claim to the administration of the effects of Thomas Hubbert, deceased.

On the 30th of December 1790, the day before the above deed was executed, Lady Skeffington and Mrs. Donovan executed a proxy of renunciation of administration of the effects of Thomas Hubbert; and, on the same 30th of December, by indenture between Sir William and Lady Skeffington of the first part, Alexander Hubbert of the second part, and Thomas Rowcroft of the third part, reciting the embarrassments of the partnership which Hubbert and Rowcroft had undertaken to settle; and, that there had been several money transactions between Sir William Skeffington and Thomas Hubbert, Sir William and Lady Skeffington renounced all right and interest of them, and either of them, to the letters of administration of the estate of Thomas Hubbert; and they authorized and empowered Alexander Hubbert to take out letters of administration to the estate and effects of Thomas Hubbert; and Alexander Hubbert covenanted with Sir W. Skeffington, that on the letters of administration being granted to him, he would release him from all claims and demands from the estate of Thomas Hubbert; and Sir William Skeffington covenanted for himself and his wife, that Sir W. and Lady Skeffington would, on such administration being granted to A. Hubbert, release him from all claims and demands which they, or either of them, might have upon A. Hubbert, as such administrator.

By deed-poll of the 11th of January 1791, duly executed, Cornelius Donovan, (the husband of Mrs. Donovan,) who claimed to be a creditor on the estate of

Thomas Hubbert, and who had not executed the above deed of composition, in consideration of a bond executed by Alexander Hubbert and Thomas Rowcroft, for securing to them 1,000*l.*, by instalments of 100*l.* each, released the estate and effects of Thomas Hubbert from all claims and demands whatsoever of him, C. Donovan.

In February 1791, letters of administration of the goods, chattels, and credits of Thomas Hubbert were granted to A. Hubbert, out of the Prerogative Court of Canterbury. After the death of Thomas Hubbert, the partnership business was carried on by Alexander Hubbert and Rowcroft. By indenture of the 7th of March 1791, between Thomas Carter of the one part, and A. Hubbert of the other part, then described as administrator of T. Hubbert, the agreement of the 21st of January 1790, was carried into execution, and A. Hubbert covenanted to lay out certain sums in building. The whole of the leasehold premises were taken possession of by the partners.

By indenture, dated the 16th of July 1791, between A. Hubbert of the first part, Rowcroft of the second part, Amelia Spriggs of the third part, and Sir John Lubbock of the fourth part, in consideration of 4,000*l.* raised by Hubbert and Rowcroft, in order, as alleged by defendants, to pay off part of the above composition, Hubbert and Rowcroft granted an annuity of 420*l.* to A. Spriggs, for her life, chargeable on the leaseholds comprised in the indenture of March 1791, and assigned the premises, in trust for securing the annuity, to Sir John Lubbock, with power of sale; and subject thereto, in trust for A. Hubbert, his executors, &c. By another indenture, dated 2nd of December 1791, Hubbert and Rowcroft raised the further sum of 1,500*l.* for the same purpose, and assigned the premises comprised in the lease of June 1788, to Margaret Smith, in trust for securing the said sum, and interest, with power of sale, subject to a proviso for redemption.

By an indenture of the 27th of March 1793, between A. Hubbert of the first part, the creditors of Thomas Hubbert and Alexander Hubbert of the second part, and Rowcroft of the third part, a different arrangement for payment of the

debts of the former partnership was entered into, and Hubbert and Rowcroft covenanted to carry such arrangement into effect.

Shortly after the execution of the above deed, Hubbert and Rowcroft dissolved partnership, the latter remaining in possession of the leaseholds and other partnership property. It was presumed that Rowcroft duly executed the arrangements for the payment of the debts of the old firm, but this did not distinctly appear. A. Hubbert did not execute any assignment of the leaseholds to Rowcroft, after the dissolution, or in any manner interfere in the premises. He died in 1806 intestate and insolvent. By indenture of the 2nd of December 1795, a transfer of the mortgage in Mrs. Smith, was made to defendants Davis & Co., and the trusts of the assignment were declared in favour of Rowcroft.

In 1797, the freehold and interest of the premises comprised in the lease to Carter, of 1785, was conveyed to a trustee for Rowcroft and Carter, in equal moieties. Afterwards, by indentures of lease and release of August 1797, they partitioned the premises, and the property comprised in the leases of the 23rd of June 1788 and the 7th of March 1791, was conveyed to the use of Rowcroft in fee. In the year 1805, Rowcroft deposited the title deeds of these premises, with Messrs. Smith & Co., for securing 15,000*l.*, and by deed-poll of the 31st of January 1805, reciting the indentures of August 1797, and that the premises, or part thereof, were subject to the indentures of lease of the 11th of October 1785 and 23rd of June 1788, and that A. Hubbert, the administrator of T. Hubbert, was indebted to Rowcroft in the sum of 7,878*l.* and upwards, Rowcroft charged the said premises with the sum of 15,000*l.* The debt was afterwards paid off by Rowcroft, and the deed-poll was cancelled. Rowcroft afterwards charged the premises comprised in the lease of June 1788, with two annuities to Mrs. Logie for the term of her life. In 1807, the annuities to Spriggs and Logie continuing, Rowcroft, for securing a large sum of money, deposited with Davis & Co. the title deeds of the premises, and in August of the same year executed to them a deed

of charge. By indentures of lease and release of the 18th and 19th of January 1815, Rowcroft conveyed the premises vested in him, under the partition deed of August 1797 to Davis & Co., upon trust for sale, subject to the annuities of Spriggs and Logie, and to the leases of October 1785 and June 1788. By indentures of the 22nd and 23rd of June 1818, Rowcroft released his equity of redemption to Davis & Co., subject to the annuities and the above leases, and the several terms thereby demised.

The annuitants Spriggs and Logie died in 1821; Rowcroft died in 1824, having appointed defendant Whitehouse his executor. The defendants Davis & Co. sold part of the premises to defendant Ferrard in 1822, and the remainder to the defendant Thompson in 1825.

On the abstract of title being laid before counsel on behalf of Thompson, it was objected, that the terms created by the leases of 1788 and 1791 were outstanding, and it was required that letters of administration *de bonis non* to Thomas Hubbert, should be taken out to cure this defect. On application to the plaintiff, he refused to renounce any right he might have to administration, as nearest of kin of Hubbert; afterwards, the Prerogative Court upon a full statement of the facts, but without citing the plaintiff, granted a limited administration to White, a nominee of the defendants, by whom the terms were assigned to the purchasers.

The plaintiff afterwards obtained revocation of the administration to White, and letters of administration *de bonis non*, of T. Hubbert, were granted to him, the plaintiff. In May 1831, he, as such administrator and representative of Lady Skeffington and Mrs. Donovan, filed the present bill, not mentioning the deeds of the 30th of December 1790 and 11th of January 1791, accounting for the proxy of renunciation of Lady Skeffington and Mrs. Donovan, by stating, that they merely renounced to enable A. Hubbert to arrange the complicated affairs of T. Hubbert, and charging that Rowcroft was a mere incumbrancer on, and not absolute owner of the leases. That in the transactions with Smith & Co., and Davis & Co., he treated himself as such; that he kept

accounts as mortgagee within twenty years; that in the sale to Davis, he expressly excepted the leases; that he acquired no title thereto, as there was no representative to T. Hubbert, from the death of A. Hubbert, until after the sale to Davis & Co.; and that Davis & Co., in the Ecclesiastical Court, grounded their title on the fact of more debts having been paid by Rowcroft than the whole value of the leases. The bill prayed, that plaintiff might be declared entitled to redeem, and that an account of what was due on both sides might be taken.

The defendants were unable to produce any deed of release, in pursuance of the covenants of the 30th of December 1790, but having proved the loss of several deeds in the possession of Thomas Rowcroft by accident, put in as secondary evidence of mutual releases between Sir W. and Lady Skeffington and A. Hubbert, the following bill of costs:—

Cornelius Donovan, Esq.

D^r to Thomas Trundle.

1790.	£.	s.	d.
Dec.—Attending you, consulting and advising on the affairs of Thomas Hubbert, deceased, and taking instructions for special deed of renunciation of letters of administration from Sir William Skeffington, and Dame Catherine his wife, in favour of Alexander Hubbert, and for covenants between the parties, to execute general releases to each other.....	0	6	8
Drawing deed accordingly. (16 folios)	0	16	0
Fair copy for the perusal of the parties	0	5	4
Attending, reading over, and settling same	0	6	8
The like on Mr. Hubbert, and filling up the blanks	0	6	8
Engrossing two parts thereof	1	0	0
Duty, &c.	0	13	0
Attending, reading over, and the execution of deeds by Mr. Hubbert and Mr. Rowcroft, and afterwards to leave with you to forward to Sir William Skeffington for execution, and instruction thereon	0	6	8
1791.			
Jan.—You having returned me one part of the deeds, executed by all parties, with directions to prepare the releases, and attending Mr. Hubbert in Mark Lane, to inquire if letters of administration granted to him, &c.	0	6	8
Feb.—Perusing letter of administration and deed, and taking instructions for general releases between said parties pursuant to their covenants.....	0	6	8
Drawing and engrossing release of Mr. Hubbert to Sir William Skeffington	0	7	6

Duty, &c.....	0	6	4
Attending Mr. Hubbert, reading over releases, and execution thereof	0	6	8
Drawing and engrossing release from Sir William Skeffington and Dame Catherine, his wife, to Mr. Hubbert	0	7	6
Duty, &c.....	0	6	4
Attending you with releases, and instructions thereon.....	0	0	0
Letters and porters	0	2	0
		6	10 8
1792.			
Brought from folio 301	0	16	10
May 5.—Received	7	7	6
	T. T.		

Only part of this bill was in the handwriting of Trundle, Donovan's solicitor, who was dead. Plaintiff's counsel contended against its admissibility and cited—*Barker v. Ray*, 2 Russ. 63.

Warren v. Greenville, 2 Stra. 1128.

ALDERSON, B., after referring to *Lord Lorton v. Gore* (1), allowed the evidence.

Mr. Swanston Mr. Lovat, and *Mr. James Russell*, for the plaintiff, contended, first, that there was no ground for presuming any sufficient release by Sir W. and Lady Skeffington of the residue, and that the release by Donovan was only of particular debts. Secondly, that plaintiff, as administrator *de bonis non*, was the proper person to institute the suit, and that White could not, by his assignment, strengthen the defendants' title. Lastly, that any lapse of time would not apply, as time does not run while the estate is unrepresented—*Murray v. the East India Company* (2); and that the recitals describing the premises as subject to the leases and annuities were conclusive of Rowcroft having considered himself a mere mortgagee within twenty years.

Sir W. W. Follett, *Mr. Turner*, and *Mr. W. H. Busk*, for defendants Davis & Co., argued, that from the fact of the estate being insolvent, and from the general terms of the deed of the 31st of December 1790, it must be considered as a release of all claims. That even if no actual release were executed, such a deed would operate as a release in equity, and the covenants be tantamount to an actual release. It is

not to be supposed that Rowcroft intended to render himself liable to a large amount of debt, in order to have the estate administered for the benefit of the next-of-kin. It is clear from the bill of costs, that not only the deeds, but the releases were executed; and, under such circumstances as the present, if it is considered that a release should have been executed, the Court, after so long a period, is bound to presume it has been done. Donovan's deed is part of the general arrangement; it must have been the intention of that deed to release generally; and *Collier v. Squire* (3) is a direct authority, that under such circumstances the words of this release are sufficient to pass Donovan's whole interest. There is no allegation of fraud or concealment in the general arrangement; on the contrary, the next-of-kin may be presumed to have acquiesced. In *Chalmer v. Bradley* (4), an inquiry, after great lapse of time, was directed, it is true, but with great reluctance, and that was a much stronger case than the present. Rowcroft has, for a series of years, exercised entire disposition over, and improved the property. All the acts of both A. Hubbert and Rowcroft shew a dealing with the property in the character of absolute owners; there is no evidence of admission in those parts of the claims of the next-of-kin; the recitals do not of themselves raise any inference of the terms being mortgaged terms; and, if Rowcroft was mortgagee at all, he was mortgagee of A. Hubbert only. If, however, Rowcroft is a mortgagee, the plaintiff is not the person to redeem. In the deed of December 1791, on which the plaintiff rests his title, the proviso for reassignment is to A. Hubbert, his executors, administrators, or assigns: the plaintiff is none of these. The law on this subject is laid down in 1 *Williams on Executors*, 651; see also *Butler v. Bernard* (5). The alienation of a term by an administrator, is a total alienation *quâ* the intestate's estate, and the new right of the equity of redemption in the administrator passes on his death to his executor

(3) 3 Russ. 467; s. c. 5 Law J. Rep. Chanc. 186.

(4) 1 Jac. & Walk. 51.

(5) Freem. Ch. Ca. 139, pl. 176; s. c. 11 Vin. Abr. 'Executors,' (M. 6), pl. 7, p. 108; 1 Ca. Ch. 224.

(1) 1 Dow & Cl. 190.

(2) 5 B. & Ald. 204.

—*Hosier v. Lord Arundell* (6). Lastly, the objection of length of time arises. *Murray v. the East India Company* does not apply, because there the intestate never had a right of action. The cases turn upon this, that if at any time any party could have brought an action, or instituted a suit, the statute shall run from that time. It is not only to the administrator where lapse of time ought to be applied, but to the person beneficially interested.

[ALDERSON, B.—Time, as between A. Hubbert and Rowcroft, is out of the question, for as between them there was no adverse holding. Then, supposing A. Hubbert to be an administrator in the ordinary way, can it be contended that time was any bar as between him and the next-of-kin, for whom, in that view of the case, he would be a trustee? If you rely on lapse of time, I think you must only use it as evidence of the arrangement you contend for.]

It is clear, that it was in no other character than that of absolute owner, that whilst in possession Rowcroft acted; consequently, as against A. Hubbert, it was an adverse possession, and the legal estates being outstanding, will not affect the question.

Cholmondeley v. Clinton, 2 Jac. & Walk.

1; s. c. 2 Mer. 171; 4 Bligh, 1.

Cuthbert v. Creasy, 4 Bligh, 125.

Pim v. Goodwin, *ibid.* 133.

But if he be considered simply as a mortgagee, the equity of redemption is barred by an adverse possession of twenty years, and nothing will stop time when it once begins to run.

Doe d. Droure v. Jones, 4 Term Rep. 300.

Cotterell v. Dutton, 4 Taunt. 826.

Anonymous, 2 Atk. 332.

St. John v. Turner, 2 Vern. 418.

Lomax v. Hide, *ibid.* 185.

Beckford v. Wade, 17 Ves. 97.

Besides, the long acquiescence in the acts of Rowcroft, by the ancestors of the plaintiff, they standing by and permitting him to expend large sums in the improvement of the property, which sums cannot now

be recalled, render it impossible to allow the plaintiff's claim.

Chalmers v. Bradley, 1 Jac. & Walk. 51.

Hickes v. Cooke, 4 Dow, 16.

The East India Company v. Vincent, 2 Atk. 83.

Goett v. Richmond, 7 Sim. 1.

Mr. Simpkinson and Mr. G. Richards, for Thompson and Farrand, the purchasers, contended, that the next-of-kin of T. Hubbert, absolutely released all interest in the property. That equity will not relieve a party claiming against a holder of an equitable interest, after twenty years adverse possession—*Cholmondeley v. Clinton and Grenfell v. Girdlestone* (7). That by no recital was there any admission of the equitable interest of Skeffington and Donovan. That the acts of the administrator White, were binding on the subsequent administrator, although the previous letters of administration were revoked.

Bro. 'Administrators', pl. 33.

Packman's case, 6 Rep. 18, (b).

Cro. Eliz. 459.

Syms v. Syms, Sir T. Raym. 224; s. c. *nom. Semine v. Semine*, 2 Lev. 90.

Philips v. Biron, 1 Str. 509.

Blackborough v. Davis, 1 P. Wms. 43; s. c. 1 Lord Raym. 685.

Allen v. Dundas, 3 Term Rep. 125.

[ALDERSON, B. mentioned *Foster v. Alvez* (8), as an authority to shew that an act done under the authority of a court of judicature, will be supported in all its consequences.]

Again, it is clear that the plaintiff has no right to sue these defendants. He has not administered to Sir W. Skeffington, nor are the executors of Donovan made parties. If he has any right as administrator *de bonis non*, he cannot yet redeem a mortgage made by a prior administrator—*Barker v. Talbot* (9). The defendant is barred by lapse of time.

Hercy v. Dinwoody, 4 Bro. C.C. 257.

Hillary v. Waller, 12 Ves. 239.

Parke v. White, 11 Ves. 226.

Campbell v. Graham, 1 Russ. & M. 453.

(7) 2 You. & Col. 662; s. c. 7 Law J. Rep. (N.S.) Ex. Eq. 42.

(8) 3 Bing. N.C. 896.

(9) 1 Vern. 473.

(6) 3 Bos. & Pul. 7.

Mr. Ellison, Mr. Rogers, and Mr. Ombler, for other parties.

Mr. Swanston, in reply. — The single question in equity is, who is entitled to the estate? — *Jones v. Waller* (10). The reservation to the assigns of A. Hubbert, was a breach of trust on his part, and the Court may require the legal estate to be reconveyed to the administrator of T. Hubbert — *Cubidge v. Boatwright* (11). The reasoning to the contrary will not bear scrutiny.

Hosier v. Lord Arundell, 3 B. & P. 7.

Partridge v. Court, 5 Price, 412.

Catherwood v. Chabaud, 1 B. & C. 150;
a. c. 1 Law J. Rep. K.B. 86.

The assignment by White to Thompson and Farrand was illegal, and White being neither legally nor equitably entitled, they are in no better position by his assignment — *Anonymous* (12). The defendants make no denial of the acknowledgments of the mortgages, but set up a contract with the next-of-kin. To have met the plaintiff's claim, by setting up the title of a third person, the defendants ought properly to have pleaded a cross bill: they rely on that mode of defence by their answer only, which is contrary to practice. He then argued, that there was no sufficient evidence to presume any release, and that the defendants did not deal with, or hold the property adversely to the next-of-kin.

Feb. 7. — *ALDERSON, B.* — This was a bill filed by the plaintiff as administrator *de bonis non* of Thomas Hubbert, deceased, who died intestate in 1790, leaving two sisters his sole next-of-kin; and the plaintiff also claims as a party beneficially entitled to the estate, being the son of one of Thomas Hubbert's sisters. On this part of the case, however, I think he is not entitled to my judgment, from the circumstance pointed out in the argument, as to the want of proper parties to the bill.

The bill sets forth two leases — one granted in 1788, to the intestate, and another granted, after his death, in 1791, to Alexander Hubbert, his administrator, but in consequence of an agreement made

with the intestate in his lifetime. It then sets forth a deed of composition with the creditors of the intestate, (and to which Thomas Rowcroft was also a party,) by which Rowcroft and Alexander Hubbert undertook to pay 15*s.* in the pound, and the creditors renounced administration in favour of Alexander Hubbert. It then states, that Thomas Hubbert's affairs being in a complicated state, the next-of-kin also renounced administration in favour of Alexander Hubbert, to whom, in consequence, letters of administration were, in 1791, granted. The bill then proceeds to trace the dealings of Alexander Hubbert with the two leases in question. It appears, that the lease of 1791 was assigned to Sir John Lubbock as trustee, as a security for an annuity of 420*l.*, to a person of the name of Spriggs, who died in 1821, and is now outstanding in him, or his assignee.

As to the lease of 1788, the bill states that it was mortgaged by Alexander Hubbert — at first to a person named Smith, for 1,500*l.*, and that that mortgage was afterwards assigned to Thomas Rowcroft.

The defendants are stated by the bill to claim the interest in these leases by *mesme* conveyances; and the bill also prays, that the plaintiff may be declared to be entitled to redeem, and that a proper account of what is due on both sides may be taken for that purpose.

The defendants set up, in answer to this, an agreement in substance this: that Thomas Hubbert's estate being insolvent, all parties, both the creditors and the next-of-kin, agreed to give up to Alexander Hubbert and Thomas Rowcroft all interest in that estate for valuable consideration, which agreement was fully carried into effect; and that, consequently, the plaintiff, neither as administrator *de bonis non*, nor as the person beneficially interested as the representative of the next-of-kin, is entitled to the relief he now prays.

There are two questions which alone I propose to consider in this case. The first is, whether, supposing the case in other respects satisfactorily established, the plaintiff, who, upon the bill as at present framed, cannot rest upon his case as the party beneficially interested, is, nevertheless, as administrator *de bonis non* of

(10) 2 Ca. Ch. 129.

(11) 1 Russ. 549.

(12) Com. Rep. 150.

Thomas Hubbert, entitled to the relief he now prays; which is, to have an account taken, and to be allowed to redeem (on paying what shall be found to be due) the two leases of 1788 and 1791, mentioned in these proceedings. These leases were conveyed by Alexander Hubbert to those under whom the respective defendants now claim, with a power of redemption reserved on the deeds of conveyance to Alexander Hubbert and his representatives. Alexander Hubbert, at the time of the conveyance, was, and the deed so expresses it, the administrator of Thomas Hubbert, to whose estate the leases originally belonged.

On the part of the defendants, it is contended, that even if the facts stated by the bill are assumed to be correct, still the plaintiff, as administrator *de bonis non*, has no right to sustain the present bill; and for this, they cite *Butler v. Bernard*, which is undoubtedly in point. In that case, Lord Nottingham, no inconsiderable authority in such cases, determined, that the right of redemption was not in the administrator *de bonis non*, but in the representative of the original administrator.

It was at one time contended, that the report in *Freeman* was incorrect; but I think that has altogether failed. The same case is reported, and to the same effect, in 1 *Chanc. Cases*, 224, though with a query in a note annexed, as to the soundness of the decision. It is cited in *Vin. Abr.* and in other books of authority. And, lastly, on consulting Lord Nottingham's MSS., it turns out to have been, in all respects, correctly reported by *Freeman*. It is, therefore, a clear decision, and properly reported, of a most eminent equity lawyer, profoundly acquainted with the theory and principles of equity; and, undoubtedly, it is precisely in point. On the other hand, it is contended that it ought, upon principle and authority, to be overruled. No case actually overruling it has been produced; nor, after looking at Lord Lyndhurst's judgment on the demurrer in this case, do I find that he has overruled it here. If he had done so, I should, probably, have acquiesced in his judgment, whatever might have been my own opinion, leaving the parties, if they thought proper, to resort to their appeal to the House of Lords. But Lord Lyndhurst seems to me to have come to a

conclusion, that it was not necessary for him to decide the question. The point could not, I conceive, have been so fully raised before him as before me; for I think that the learned counsel have taken the correct view, that it was really necessary to his decision to have considered this question. If he had adverted to the difficulty of sustaining the suit by the plaintiff as the party interested, arising from the omission of proper parties on the record, he would probably not have stated, as he did, that it was sufficient to distinguish this case from that in *Freeman*, by the circumstance, that here, the plaintiff was entitled to relief as the party beneficially interested. But that was the ground of his decision; and if the facts had warranted it, there can be no doubt that the decision was right. Even supposing that the learned counsel are right in saying that they did not, they must fail in convincing me that Lord Lyndhurst's decision was intended to be at variance with the authority in *Freeman*.

Then, is there any other authority at variance with it? For this purpose, *Cubridge v. Boatwright* was cited. There, Sir John Leach held, that the administrator *de bonis non* was entitled to sue. A testatrix had directed a leasehold to be sold, and the money to be divided among five persons; and the administrator committed a breach of trust, and sold it for his own use. Sir John Leach held, that it had not been administered at all. The rule is, that equity treats a thing so done, as not having been done at all; and the sale, therefore, being one which ought to be set aside in equity, the administrator *de bonis non* (who would have taken it, if there had been no sale, as a chattel assigned to his administration by the Ecclesiastical Court,) was entitled to sue in equity, in order to place himself in that situation. But it does not follow from thence necessarily, that if the legal act done by the administrator be affirmed, the equity which arises out of that legal act, must not be in the person by whom the legal act was done; and that the administrator *de bonis non* is entitled to make such a claim as this. If the contract made be affirmed, must it not be affirmed altogether? And part of the contract which the mortgagee makes is, that he will re-convey to the representatives of

the mortgagor. What is an equity of redemption? It is but the power to redeem, reserved in equity after the legal power to redeem has been lost, by the lapse of the time given by the deed. A court of equity does but carry into effect the real bargain, which is a pledge of land on a loan of money, by holding that the time for redeeming is not of the essence of the contract. But the persons who are to avail themselves of this equity, must be the same as those who, during the time fixed, could have redeemed at law; for otherwise, equity would alter the bargain. That seems to me to have been the ground on which Lord Nottingham proceeded. There are, undoubtedly, cases where the power to redeem is reserved to special persons, and, those failing, the general representatives of the mortgagor, although not named, have been allowed to redeem. But these cases are plainly distinguishable from the present. Here, there is no such failure of the persons designated by the deed. There may be very different equities between the original administrator's representative and the mortgagee, and between him and the administrator *de bonis non*. Again, if this right passes to the administrator *de bonis non*, it may place the representative of the original administrator in a very unfair situation; for if such an act as this makes the estate of the administrator who does it liable as for a *devastavit*, his representative ought at least to have the equity of redemption, in order that he may discharge his testator's personal liabilities thereout. If, however, the party interested sue—as no doubt he may do—making the representatives of the first administrator parties, neither of these difficulties will arise: that, in fact, was Lord Lyndhurst's view of the case. Upon the whole, therefore, I do not see sufficient reasons for overruling the distinct authority of the case in *Freeman*; and, on the contrary, after considering it, I think it well decided. On this ground, therefore, the defendants would be entitled to my judgment.

But I shall proceed to deliver my opinion also on the second question of importance discussed in this case, as I should be very sorry to leave the case here; for even if on appeal my judgment on this point should be confirmed, the dispute be-

tween these parties would not be at an end, inasmuch as the plaintiff, by amending his bill, and bringing other parties before the Court, would, ultimately, be entitled to have a decision on the real merits of the case.

It is, however, quite clear, that if the mortgage was made under such circumstances as entitled Alexander Hubbert and Thomas Rowcroft to dispose absolutely of these leases as their own property, the plaintiff can have no claim in any view of the case. I shall, therefore, examine that proposition upon the evidence brought before the Court.

In the first place, I am quite satisfied that the estate of Thomas Hubbert was, at his death, wholly insolvent: that was the result at which all parties interested arrived in 1790; and it would be a strange thing, if, with much more imperfect means of knowledge, I should come to an opposite conclusion.

The estate being thus insolvent, and not merely in a complicated state, as suggested in the plaintiff's bill, had, however, a claim on Sir W. Skeffington, the husband of one of the intestate's sisters, in respect of an unsettled account between him and the intestate. It was doubtful which way the balance inclined. On the other hand, Mr. Donovan, the husband of the other sister, had a claim on the estate, the amount of which was not ascertained.

Under these circumstances, Thomas Rowcroft, a natural son of Thomas Hubbert, a young man well acquainted with business, and probably possessed of some capital, proposed to join Alexander Hubbert as partner, to make himself responsible for 15*s.* in the pound to the creditors, jointly with Alexander Hubbert, upon condition that Alexander Hubbert (on behalf of both) should be allowed by all parties to become the administrator, and to take possession of all Thomas Hubbert's estate; and upon the further condition, as the defendants contend, that the whole beneficial interest in the estate should (in case they complied with their part of the agreement) ultimately vest in Alexander Hubbert, on behalf of himself and Thomas Rowcroft.

Now, the conditions as to the creditors were, as before stated, that they should be

paid 15s. in the pound. As to Sir W. Skeffington, the agreement was, that Alexander Hubbert should release him absolutely from all claims on the part of the estate of Thomas Hubbert; as to Mr. Donovan, that Alexander Hubbert and Thomas Rowcroft should give him a bond of 1,000*l.*, payable by instalments, in full satisfaction of his debt, and of all his claims on the estate.

The defendants contend, that all this has been actually carried into effect. Some of these facts are very distinctly proved. The examinations by the creditors and by Mr. Donovan into Thomas Hubbert's affairs, are deposed to by Mr. Kaye, who has, remarkably enough, been enabled to give us a full and clear account of a transaction which took place upwards of forty-seven years ago.

After this investigation had demonstrated the insolvency of the estate, the creditors, by a deed dated the 31st of December 1790, which has been produced, agreed that they would give up the administration to Alexander Hubbert and Thomas Rowcroft; and there is no doubt that this arrangement was fully acted upon, and all claims on their part ceased in the year 1799. On the 30th of December 1790, Lady Skeffington and Mrs. Donovan, in the presence of their respective husbands, executed also a deed of renunciation, which has been produced, of their right to administer in favour of Alexander Hubbert; and on that same 30th of December 1790, Sir William and Lady Skeffington executed a deed of covenant (prepared and executed in two parts), by the recitals in which the insolvency is admitted, and in which, in consideration that Alexander Hubbert should, within a month after obtaining administration, absolutely release the claim of the estate of Thomas Hubbert on Sir William Skeffington, he agreed to execute, in return, a general release of all his beneficial interest in the estate of Thomas Hubbert. Now, to this deed Thomas Rowcroft was a party—a circumstance only consistent with the supposition that, although the administration was to be in the name of Alexander Hubbert alone, he, Thomas Rowcroft, was jointly interested in it with him, and his consent was neces-

sary to the validity of the release by Alexander Hubbert to Sir William Skeffington. This deed has been produced by the plaintiff himself, in answer to a bill for a discovery.

The next deed in order of time is the release dated the 11th of January 1791, by Donovan to Alexander Hubbert. Here, also, the insolvency is recited—the composition with the creditors, the disputed account, the claim of 2,500*l.*, the agreement to accept 1,000*l.* in full, and the giving of the bond by Alexander Hubbert and Thomas Rowcroft; and then Donovan releases, in terms which, I think, are quite large enough, (when construed as they ought to be, with reference to the surrounding facts recited,) his whole beneficial interest in the estate of Thomas Hubbert.

It then appears, from the entries in the book of Mr. Trundle, which I have received in evidence, that in February 1791, and within a month after letters of administration granted to Alexander Hubbert, the release stipulated for in the deed of the 30th of December 1790 was prepared and executed by Alexander Hubbert in favour of Sir William Skeffington; and that in the same month, and probably at the same time, a counter deed of release, by Sir William Skeffington, of his beneficial interest, was prepared and stamped, and that it was delivered to Mr. Donovan, for the purpose of its being executed by Sir William Skeffington and his wife. Here, the positive evidence stops. There is no further proof given of the actual execution of this release; but the question is, whether I ought not to infer it, from all the other admitted facts of this case. All the probabilities seem to lead to the belief that such would be the case:—whether I ought to infer that it was so, must depend on the subsequent conduct of the parties. How, then, have the parties acted since this period? The very first thing which Alexander Hubbert does as administrator, is to pledge the lease of 1791, as a security for money borrowed on annuity, and the lease of 1788, for money borrowed on mortgage. Both these acts are very improper, if he was an ordinary administrator; but if he and Rowcroft had really the beneficial interest, and thought, as the event has proved,

that the property would ultimately rise in value, they would, naturally enough, be disposed to speculate upon it. But why should they do so, if the consequences of failure would make them responsible as for a *devastavit*, and if success would only expose them to account for the surplus profits to the next-of-kin? If they had been accountable, they would have sold the leases out and out.

It is to be observed, which is a confirmation of this, that they were accountable, *sub modo*, to the creditors until 1799; and they took, therefore, the precaution to recite these acts in the schedule to the second deed of composition of 1793. Again, the subsequent purchase of the fee by Rowcroft, and his building upon the property, are facts much more consistent with this supposition, than with the notion that he was accountable to the next-of-kin in respect of these leases. His whole conduct leads to the same conclusion. How else can we reasonably account for his taking on himself such heavy liabilities? Then there is the strong fact, that neither Sir William Skeffington, who survived this transaction twenty-five years, nor Mr. Donovan, who lived sixteen years after it, and both survived their wives, (Sir William Skeffington died in 1815, Lady Skeffington died in 1813, Mr. Donovan in 1806, and Mrs. Donovan in 1803,) ever called for any account of this estate, either from Alexander Hubbert or Thomas Rowcroft, with whom they were well acquainted, and of whose dealings with the property in question they could not have been ignorant: in fact, no claim was ever made by any one till 1826, a period nearly thirty-six years after the original transaction took place, when this litigation seems to have had its origin in the unfortunate application on the part of the late Mr. Atcheson to the present plaintiff.

Now, the answer given by the learned counsel for the plaintiff to all these strong facts is, that the deeds executed between the parties after 1790, and ending in 1818, clearly shew that this was treated as a mortgage title, and that the conclusion which I have before adverted to is not correct.

I have looked at these deeds with the

attention which they deserve, and, after considering them with reference to the very able arguments addressed to me upon them by both sides, I have been unable to see how they are at variance with the notion, that Sir William Skeffington executed the release in question.

Let us examine these deeds a little in detail. Undoubtedly, in the earliest deeds (those executed by Alexander Hubbert in 1791,) in which he took the estate originally from Carter, he is described as the administrator of Thomas Hubbert. I do not see how this could be otherwise: he was claiming under a bargain with Thomas Hubbert, and his only title to have it completed was in that capacity. But all the covenants are with him and his representatives; and some of them, which relate to the laying out of money in building on the premises, are such as seem more consistent with the defendant's than the plaintiff's view of the case.

Then come the deeds executed in 1791 to Mrs. Spriggs and Mrs. Smith, to both which Rowcroft is a party. There, also, Alexander Hubbert is described as the administrator of Thomas Hubbert, and his title as administrator is set forth, which seems to have been necessary, inasmuch as the conveyance from Clarke is recited also in deducing the title. But in this deed also, the covenants are by Alexander Hubbert and Thomas Rowcroft, and upon payment of the annuity and all arrears, the trustee is to re-convey to Alexander Hubbert and his representatives, to and for their own use. The same observations apply to the mortgage of 15,000*l.* to Mrs. Smith.

I do not think that the deeds of December 1795 carry the case at all farther. At that time the creditors were still unpaid, and it was possible that the power reserved to them in the second composition deed, of making Alexander Hubbert account as administrator of Thomas Hubbert's estate to them, might be put in force. It would, therefore, be of great importance to Rowcroft, if he advanced the money to Mrs. Smith and took the mortgage, to have the deeds drawn in that form; and therein to speak of Alexander Hubbert as administrator of the estate, as in fact he then was, on either hy-

pothesis. And, besides, as between Alexander Hubbert and Thomas Rowcroft, this was a real mortgage, in which Thomas Rowcroft had a right, in settling their accounts, to take credit for 1,500*l.* beyond what he had before advanced in discharge of the debts of the estate.

The deeds by which Rowcroft secured the annuities to Logie, and which were executed in 1802, after all the creditors were paid, do not at all speak of Alexander Hubbert; and if they have any effect, have a tendency to shew, that Rowcroft was then dealing with the property as his own.

Then comes the deed which is dated in 1805, and by which Thomas Rowcroft makes an equitable mortgage of his fee-simple in the premises; and recites, that the premises were subject to that lease of 1788, and that Alexander Hubbert was the administrator to Thomas Hubbert's estate, and was indebted to him, (Rowcroft,) both in his own right, and also as administrator of Thomas Hubbert, in the sum of 7,878*l.* and upwards, and he then deposits with Smith, Payne & Smith, the title-deeds and the lease of 1788, assigning also to them his debt due from Alexander Hubbert, as a security for 15,000*l.* This deed, no doubt, as well as those which follow it, speak of those premises, the fee-simple of which had then been vested in Thomas Rowcroft, as being subject to the lease of 1788, and to the annuities to Logie and Spriggs; and they speak of the lease of 1788 having been deposited with Rowcroft, as a security for the debt recited to be due to him from Alexander Hubbert, therein also described as administrator of Thomas Hubbert.

But looking at them all, it seems to me not at all clear, that the inference sought to be established from them by the learned counsel for the plaintiff, is the true one. If the question before me were between the representatives of Alexander Hubbert and the present defendants, these deeds would be of the greatest importance in the cause. But, as between these parties, their effect is very doubtful.

It is clear to me, that even on the supposition, that the defendants have made out their case, still these leases were, as between Alexander Hubbert and Thomas

Rowcroft, at one time to be treated as securities, in which Alexander Hubbert was interested, and that Thomas Rowcroft had no absolute title to them, but was held to be called to an account by Alexander Hubbert, if that should be thought advisable; and I think that the recitals in these various deeds may be very well accounted for, without it being at all necessary for me to come to the conclusion, that Rowcroft has ever treated these terms as belonging to Alexander Hubbert, as administrator of Thomas Hubbert, and also as being part of the estate of Thomas Hubbert, for which Alexander Hubbert was accountable to the next-of-kin. Mr. Turner's very able and ingenious argument on this point satisfied me, that all the expressions may not unreasonably be reconciled with the defendants' hypothesis, and the other admitted facts of the case. Taking, however, these deeds as evidence for the plaintiff, and as leading to the supposition, that Sir William Skeffington and Mr. Donovan never did release their beneficial interest in this estate, still they are to be contrasted with the evidence offered by the defendants that they did so. And if so, I am of opinion, that the latter greatly preponderates; and I have come to the conclusion entirely satisfactory to my own mind, that they did release, as the defendants contend they did, their whole claim on the estate.

Mr. Swanston, however, contended, that this defence was not competent to be set up on this record; but I think it is, for as his case is to shew that the plaintiff, as administrator *de bonis non*, is entitled to set aside the reservation of the equity of redemption, to the representatives of Alexander Hubbert, by shewing that it probably belonged to the estate of the intestate, this defence, which negatives this case, and shews that the administrator did right in making the reservation in the form in which it is found in the deeds, effectually and properly negatives the plaintiff's title to relief. It is not, therefore, the setting up of a title in a third party, but a negating the plaintiff's title upon the record.

Neither do I see how it could be expected that the execution of the release could be stated in the defendants' answer

more explicitly. If Alexander Hubbert or Thomas Rowcroft had been living, and had so answered, the case would have been very different. But they are dead, their papers lost and dispersed by time and accident; and after a lapse of forty years and upwards since these transactions took place, this can hardly excite surprise. My surprise is, not that so much has been lost, but that so much has remained under all the circumstances of this case.

I shall not advert to the other points made on the part of the defendants. I think, at present, (but I beg to be understood, as giving no definite judgment on that subject,) that there is no solid ground for distinguishing between the case of the defendants, Thompson and Farrand, and that of Davis & Co. Nor do I think, that the lapse of time alone is such as to be a sufficient answer to the plaintiff's case, if I had taken a different view of the evidence contained in the deeds, on which so much of the argument turned. But, as I think the plaintiff cannot recover as administrator *de bonis non*, nor upon the facts appearing in this case, as the party beneficially interested, I have come to the conclusion, that this bill must be dismissed, with costs.

Decree accordingly.

C.B. }
April 19. } RABITTS v. RABITTS.

Practice.—Confirmation of Master's Certificate.

Under an order to examine the parties to a suit in this court, it is necessary that the certificate of the Master of the insufficiency of an examination put in before him by one of the parties, be confirmed.

The Master, in pursuance of a direction under the decree, having examined the parties to the suit, certified that the examination put in before him by the defendant, was insufficient.

Mr. Follett now moved for the plaintiff, for a reference to the Master to tax the costs of such examination, and, when taxed, that they might be paid by the defendant—*Hubbard v. Hewlett* (1).

(1) 2 Mad. 469.

The Court made the order, no one appearing to oppose it.

Mr. Follett, on a subsequent day, having stated to the Court that he had since ascertained, that there being no declaration in the order that the Master's certificate be confirmed, it was irregular. Upon which—

The Court ordered that the Master's certificate stand confirmed, and be referred back to the Master to tax the costs.

C.B. }
April 27. } ROGERS v. MAULE.

Queen's Remembrancer—Masters of the Court—Jurisdiction.

On a decree by this Court for an account, where the Crown was a party,—Held, that the reference must be to the Masters of the Court, and not to the Queen's Remembrancer.

J. M. H. Brown was illegitimate, and died intestate and unmarried, whereupon Mr. Maule, solicitor to the Treasury, as nominee of the Crown, took out letters of administration of his personal estate, and the Attorney General, as representative of the Crown, claimed the real estate by way of escheat, subject to an existing mortgage. This bill was filed by the plaintiff, on behalf of himself and the other creditors of the intestate, against Mr. Maule and the Attorney General, praying for an account and satisfaction of their debts out of the realty and personality. The cause was heard before the Lord Chief Baron, who, by his decree, referred it to the Master to take the account. The decree, when drawn up, was taken, for the purpose of being entered, to the Queen's Remembrancer, who refused to enter it in its then form, on the ground, that the reference ought to have been made to him, and not to the Master.

This was a motion for an order to the Queen's Remembrancer, to enter the decree as drawn up.

Mr. Simpson, in support of the motion.—The question here is, whether this

reference ought to have been made to the Master or to the Queen's Remembrancer. This is a decree in equity. The statute 57 Geo. 3. c. 18, empowering the Chief Baron to make decrees in this court, restricts his jurisdiction to equity only. It does not affect the law relating to revenue cases. A clear distinction is made between the equity and revenue side of the court, by the later act of the 1 Geo. 4. c. 35. It is clear, that under the 17th section of that act, in cases like this, the proper reference is to the Master, and not to the Queen's Remembrancer; and the partial interest possessed by the Crown cannot alter the case. The case of *The Attorney General v. Silwell* (1), was stronger than this, and there on a reference to the full Court, it was decided, that the reference should be made to the Master.

Mr. Wray, contra.—It is a mistake to say, that this Court has no jurisdiction in cases of revenue—a court of revenue is one both of equity and law. All cases in the court, where the Crown is interested in the recovery of property, are matter of revenue, and if so, the Court is sitting now in revenue; and the question is, whether this reference is right, the Master having power only, under the act, “as between subject and subject.” The Queen's Remembrancer is an officer of the Crown, whose duty it is to account for his fees, as part of the revenue. His office, except as to certain provisions in the act, is still preserved. In *The Attorney General v. Silwell*, the right of reference may be considered as having been waived, the Crown then being the plaintiff, and having the decree.

Mr. Simpkinson, in reply.—The Masters under the act are to take the minutes of all decrees, &c., “as well in matters of revenue as on the equity side of the court.”

LORD ABINGER, C.B.—If the Queen's Remembrancer or the Attorney General had appeared before me, for the purpose of suggesting, that the minutes of the decree ought to be corrected, on the ground, that the reference was wrong in principle,

it would have been undoubtedly a proper question for consideration. But, here, the Queen's Remembrancer has altered the minutes without any authority to do so; and, therefore, I do not know whether on that ground alone I should not do right in acceding to this application. But taking the question as Mr. Wray has considered it—namely, on the construction of the statute, it appears to me, that upon the terms of the 17th section, the Queen's (or what is the same thing for this purpose, the Deputy Remembrancer's) authority is gone. Undoubtedly there is some confusion in the act, from the use of the words “between subject and subject;” and I presume those have given rise to the doubts which have occurred. They first occur in the recital. Then, in describing the duties of the Masters, the act says, that “each of the Masters of such court shall act jointly or severally, as such Court or Lord Chief Baron, or other Baron, &c. shall direct, in all matters of reference from the Court, or Lord Chief Baron, or other Baron, &c. in all suits and matters on the equity side of such court, between subject and subject.” If the act had stopped at those words, it would have given rise to the conjecture, that the legislature intended to confine the cases to be heard by the Lord Chief Baron and the other Baron, to be appointed for the purposes of this act, to cases in equity, arising as between subject and subject; but then it goes on to say, that the Masters shall attend and take the minutes of all orders and decrees to be made by such Court, or Lord Chief Baron, or Baron, &c., “as well in matters of revenue as on the equity side of such court.” At first, it seems as if the Masters had nothing to do with the revenue; but, here, they are directed to take minutes of matters relating to the revenue; and the restricting words, “subject and subject,” are altogether omitted. There is then a provision, that those minutes and orders, when drawn up, shall be corrected. Now, who are the parties to correct them? Not the Deputy Remembrancer, but the Masters. If there is anything wrong in carrying into execution the minutes, the party whose business it is to alter the order or decree, as framed upon the minutes, is the Master; and,

(1) 1 You. & C. 557; s. c. 5 Law J. Rep. (N.S.) Exch. Eq. 86.

when so altered, the Deputy Remembrancer is to enter it amongst the records, "pursuant to the ancient course." The act then proceeds, "and it shall also be the office and duty of such Master," &c. Now, observe : their first duty was to act in all matters of reference in all suits on the equity side of the court : their second duty is to receive all such references on matters of account, and all other matters and things on the equity side of the court, as shall be referred to them, and to report thereon to the Court, "in such manner as was heretofore used and accustomed to be done by the person holding the office of Deputy Remembrancer." So that, by this clause, they have precisely the same powers when an account or any other matter is directed to them by the Court, as the Deputy Remembrancer had before the statute. I certainly do feel that there was some doubt

as to the extent to which the powers of the Deputy Remembrancer were affected by the act ; but, upon the whole, I am of opinion, that the effect of the act is to exclude the whole jurisdiction of the Deputy Remembrancer in cases of this nature, and that all the duties which were formerly exercised by him in such cases, are now to be exercised by the Masters. On a former occasion, when a memorial was presented to me on this subject, I thought it right to consult the other Barons, and they were clearly of the same opinion as myself ; I am, therefore, enabled to express myself on the present occasion with more confidence than I otherwise should have done. The only question then is, what order I am to make here ; and I think it must be, that the Queen's Remembrancer do enter the decree as the Court pronounced it.

Order accordingly.

GENERAL ORDERS IN EQUITY.

Tuesday, the 6th day of June, 1837.

Setting down Causes and Service of Subpœna ad audiendum judicium.—Causes may be set down, and Subpœnas served and made returnable on any day out of Term, as well as in Term.—Subpœnas ad audiendum judicium may be served on Clerk in Court.

1. WHEREAS the present practice, that causes can only be entered for hearing on the Seal day after every Term, and that the *Subpœna ad audiendum judicium* can only be returnable in Term time, is productive of delay and inconvenience, THE COURT DOETH ORDER that from and after the last day of the present Trinity Term, Causes may be set down for hearing, and the *Subpœnas ad audiendum judicium* be served and made returnable on any day, as well out of Term as in Term, but every such Subpœna is to be served in a Country Cause fourteen days, and in a Town Cause ten days before the same is made returnable. AND IT IS ORDERED, that service on the Clerk in Court for any party of a *Subpœna ad audiendum judicium* shall be deemed good service.

Times of opening and shutting the King's Remembrancer's Office.

2. AND WHEREAS inconvenience arises from there being great irregularity in the times of opening and shutting the King's Remembrancer's Office: IT IS HEREBY ORDERED, that the said Office be kept open from Nine o'clock in the Morning until half-past Four o'clock in the Afternoon, Holidays excepted, from the first day of every Term, until the last day of the Sittings of the Court after every Term, and at all other times from half-past Nine o'clock in the Forenoon till Four o'clock in the Afternoon.

Services of Notices of Motions and Petitions.—Filing of Affidavits.

3. AND IT IS ORDERED, that every notice of motion, and every Petition whereof notice is necessary to be given, shall be served, and all Affidavits intended to be read in support thereof, be filed at least two clear days before the hearing of such motion or Petition, unless otherwise specially Ordered by the Court, and all Affidavits intended to be used in opposition to any motion or Petition shall be filed before they are read in Court.

Signatures of Defendants to Answers.

4. AND IT IS ORDERED, that the defendants shall not be required to sign each Skin of an Answer, but that every Answer shall be deemed good and sufficient if the defendants do sign the last Skin thereof, and the last Skin of the Schedule or Schedules thereto.

Caption of Answers of Markmen.

5. AND IT IS ORDERED, that it shall be deemed sufficient if the caption of the Answer of every defendant who is unable to write his or her name, and which shall be taken before Commissioners in the country, states that the Answer purporting to be sworn to by the defendant was read over to such defendant, who appeared perfectly to understand the same, and made his or her mark thereto in the presence of the Commissioners before whom such Answer was sworn, without requiring an Affidavit of the Answer having been so read over.

Copies to be delivered to the Court in certain cases.

6. AND IT IS ORDERED, that in all cases of Pleas, Demurrers, and Exceptions to Answers, or to Master's Reports of Scandal or Impertinence, Copies of the Bill, Plea, or Demurrer, Answer and Exceptions, and Master's Report be delivered by the party who sets down the same, at the Chambers of the Judge before whom the argument is to come on, one clear day at least before the day appointed for such argument; but in cases of Scandal or Impertinence, the same Copies are to be delivered to the Judge as were laid before the Master on the reference.

AND IT IS ORDERED, that the foregoing Orders shall take effect from and after the last day of this present Trinity Term, and that the same be entered with the Registrar, and that Copies of the same be put in the King's Remembrancer's Office, and the several Offices of this Court.

(Signed)

ABINGER.
J. PARKE.

W. BOLLAND.
E. H. ALDERSON.

REPORTS
OF
CASES ARGUED AND DETERMINED
IN THE
Court of Bankruptcy.

BY
CHARLES STURGEON, Esq. and EDWARD COOKE, Esq.
BARRISTERS-AT-LAW.

FROM MICHAELMAS TERM, 1837, TO TRINITY TERM, 1838,
BOTH INCLUSIVE.

CASES ARGUED AND DETERMINED

IN THE

Court of Bankruptcy.

COMMENCING IN

MICHAELMAS TERM, 1 VICTORIA.

1837. }
Nov. 7. } *Ex parte* AUSTIN *re* AUSTIN.

Absenting from Dwelling-house — Evidence of Intention.

An execution being put into the house of the bankrupt, during the time the officer was in possession, the bankrupt absented himself without making any provision as to creditors who might apply in the meantime:—Held, an act of bankruptcy.

Such absenting is evidence of intent to delay, unless rebutted by strong evidence of a different intention.

On the 7th of June 1837, an execution issued against the bankrupt, and the officer took possession of his goods in his dwelling-house. The bankrupt inquired of the officer, whether the shop was to be kept open; the officer replied that it might, but that he must receive the money. The bankrupt then declined keeping the shop open, and retired to the distance of about three miles, on a visit to his father-in-law, and was absent till the night of the 11th of June, without giving any directions as to any creditors who might call in the interval. This was a petition by the bank-

rupt to annul the fiat, on the ground, that this absenting was no act of bankruptcy.

Mr. Swanston, for the petitioner.—Shutting up a shop is no act of bankruptcy; neither is continuing absent. There is no evidence of intent to delay, and it is not suggested that he was apprehensive of arrest.

[*SIR G. ROSE*.—Shutting up the shop without leaving means to pay his creditors, is strong evidence of the intent, unless it is explained.]

If a man who has the disposition over his goods shuts up his shop, the evidence is strong; but the bankrupt here was driven from his home by the execution.

Mr. Keene, for the petitioning creditor.

THE CHIEF JUDGE.—When the petition itself states, that the bankrupt had closed his shop and left his house, without instructions as to what was to be done on the application of any creditor, it appears to me, that these are sufficient circumstances to say, that the act of bankruptcy is established, unless by strong evidence another intention can be shewn, because the consequence to creditors must be delay. The intent is a mere inference to be drawn from the acts of the bankrupt, and not

from his statements. He says, he left no instructions, because he did not expect any application. The natural consequence of his acts would be, that creditors would immediately apply.

SIR J. CROSS concurred.

SIR G. ROSE.—The only question is, do the circumstances under which the shop was shut up relieve the bankrupt of the intention which the law has put upon that act? I think it was a clear act of bankruptcy, on the bankrupt's own shewing.

Petition dismissed.

1837. } *Ex parte* COTTERILL *re* DOUGLAS.
Nov. 11. }

Principal and Agent—Bills of Exchange—Specific Appropriation.

C. & Co. consigned goods through D, A, & Co., trading in London, to D, M, & Co., trading at Singapore. The remittances of the proceeds were sent through D, A, & Co. to C. & Co., in bills, accompanied by a letter, stating that the bills were on account of and belonged to the parties mentioned. Letters were also inclosed for C. & Co. and other creditors, giving notice of the remittance in their favour. The amount of the bills sent, was not equal to the sums directed to be paid, and D, A, & Co. were therefore required to make up the deficiency, and after the perusal of the letters, to forward them to the creditors. Before the bills arrived, D, A, & Co. became bankrupt, and the bills came into the hands of their assignees, who insisted upon their right to retain them, as they had a claim to a much larger amount against D, M, & Co., the remitters:—Held, that the letters constituted a specific appropriation of the bills; and that the bills formed no part of the bankrupt's estate.

Cotterill & Co. were in the habit of consigning goods through the London house of Douglas, Anderson, & Co., to the house of Douglas, Mackenzie, & Co., trading at Singapore. The accounts of the sales, and the remittances of bills, in payment of the same, to Cotterill & Co., were generally transmitted through the house of Douglas, Anderson, & Co.

On the 31st of December 1836, the following letter, with the bills inclosed, was

written by Douglas, Mackenzie, & Co., to their agents Douglas, Anderson, & Co.:—

"We beg to inclose you the following bills, to the amount of 5,286*l.* The above bills are on account of and belong to the following parties:—

"To the Belgian Company, the three first bills amounting to 769*l.*

"To Cotterill & Co., 736*l.*

"These bills do not cover the amount to be paid (5,875*l.*), but the balance of our late adventure will cover the excess. We have inclosed letters to the above parties, which, after perusal, we will thank you to forward."

Douglas, Anderson, & Co. became bankrupt on the 8th of December 1836, and consequently this letter and the bills came into the hands of their assignees, who claimed to retain the property as part of the bankrupt's estate, as there was a debt larger than the amount due from Douglas, Mackenzie, & Co., to the estate of the bankrupt. The letters inclosed in the letter of the 31st of December 1836, giving notice of remittance to the several creditors, were forwarded by the assignees to the several parties, and among them, one to Cotterill & Co., which was as follows:—

"Singapore, December 31, 1836.

"Messrs. Cotterill, Hill, & Co.

"We confirm our last respects of the 29th ult., per 'Samuel Winter,' and beg to inform you, that we this day have remitted to you, through Messrs. Douglas, Anderson, & Co., London, in full of account sales rendered 3,149 francs 25 cents, by bill at six months, 4*s.* 8*d.* exchange, is 734*l.* 16*s.* 6*d.* sterling, which we trust you will find correct. You will observe that part of the sales are not yet due, but we have, in this instance, been enabled to purchase bills on England, at a credit of two months, and were desirous of seeing your account closed, as our establishment here ceases after this date.

"We are, &c.

"John Douglas, Mackenzie, & Co."

The Belgian Company had presented a petition, claiming the three first bills in the letter of the 31st of December mentioned, and had obtained a decision in their favour in July last. This was the petition of Cotterill & Co., and it prayed that they might be declared entitled to the sum of

734*l.* 16*s.* 6*d.*, as money of theirs, in the hands of the assignees, specifically appropriated by the letter of the 31st of December 1836.

Mr. Swanston and *Mr. Anderdon*, for the petition.—The petitioners ask an order upon the same principle as that made in the case of the Belgian Company. The words of the letter are, “the above bills belong to, and are on account of the following parties.”

[The CHIEF JUDGE.—No specific bills were remitted for Cotterill & Co., but these were merely directions, that out of the produce, 734*l.* should be paid by Douglas, Anderson, & Co. to Cotterill & Co.]

Those bills were received by the assignees after the bankruptcy, and disposed of by them, and the proceeds are now in their hands. *Williams v. Everitt* (1) only decided, that where an order had been given to an individual, in whose hands property was, to make an application of it to a third person, that would not give that third person a right of action against the holder of the property, without his assent so to apply it, because there was no privity of contract between the parties. That has no application to the present case, because the parties in whose hands the funds are, were mutual agents. The assignees have no right to the property; they must either apply it according to the directions of the letter, or restore it to the remitters.

[SIR G. ROSE.—What is decided here does not prejudice the right of the Singapore house, to reclaim the property. I suppose there is no revocation alleged except by operation of law?]

None. *Buchanan v. Findlay* (2) excludes every pretension of the assignees, and the remittance coming clothed with a special trust, prevents them applying the doctrine of *Williams v. Everitt*. In *Scott v. Porcher* (3), it was held, that where the consignee had entered into no engagement with the party in whose favour the remittance was made, the consignor could revoke the mandate; but it is otherwise where a letter accompanying the remittance gives the right. It may be collected from that case, that though no legal obligation is created,

yet there is an equitable obligation through that privity. In *Biggs v. Cox* (4), it is not doubted but that a court of equity would interfere. The force of the legal principle alone precludes a trust from being raised by notice. Here, a merchant receives goods and sells them, and makes a remittance to an individual, in privity both with himself and his principal. That precludes Douglas, Anderson, & Co. from repudiating the trust imposed upon them. The assignees receiving the goods, must be bound in the same way as the bankrupt; they cannot, therefore, apply them to any other purpose.

Mr. J. Russell and *Mr. Bethell*, for the assignees.—This is a different case from that of the Belgian Company. The decision of the Court, in that case, was grounded on an inference of the fact, that the money was remitted to Douglas, Anderson, & Co., *quæ* agents of the Belgian Company.

[The CHIEF JUDGE.—This letter expressly gives the bills as the property of the several parties: “I remit these bills, which are on account of and belong to the several parties.”]

There is a distinction between the cases. A remittance of property to a person, with directions to apply the proceeds in favour of a third party, will not give that third party any ground for an action at law, or any lien in equity—*Scott v. Porcher*. In *Ex parte Heywood* (5), Lord Eldon conceived the question to be identical with the question at law.

[The CHIEF JUDGE.—In *Scott v. Porcher* there was no notice by the remitter to the person on whose behalf the remittance was made, and there was also a subsequent revocation by the remitter. If the remittee has made himself liable to the party claiming, the power of revocation is gone. The question is, if what has been done amounts to an appropriation.]

[SIR G. ROSE.—If it is nothing more than an order for payment, it is subject to revocation; if more, it is not.]

The first difficulty is to understand how the question is to be raised upon the petition, for it is a question between the Singapore house and the petitioners, and *prima facie* the assignees have no interest.

(1) 14 East, 582.

(2) 9 B. & C. 738; s. c. 7 Law J. Rep. K.B. 314.

(3) 3 Mer. 663.

(4) 4 B. & C. 492.

(5) 2 Rose, 335.

[The CHIEF JUDGE.—You claim the money in respect of a debt due to you from the Singapore house.]

If it is the property of the Singapore house, the assignees claim it, in consequence of a large balance due to the bankrupt from them. It is difficult to see how the jurisdiction in bankruptcy arises upon this question. Douglas, Mackenzie, & Co. are not bound by it. They may say, "We intended to remit property to our agents, but before the remittance arrived, their authority was at an end by the bankruptcy; the assignees were never our agents, and we will make them answerable in an action."

[SIR J. CROSS.—You are merely stakeholders, and the party can give you an indemnity. The remitters have no interest, except to insist that that should be done, which they have agreed should be done.]

As to the construction of the letter. "The above bills are on account of, and belong to the following parties." If they belong to them, could they bring an action of trover for them? Suppose Douglas, Anderson, & Co. were solvent, Douglas, Mackenzie, & Co., being their debtors, have remitted bills to them, to pay the proceeds to a third party; they refuse to hand them over, and put them to try their right. They could not recover upon that letter. The letter was not sent direct to the petitioners, but was inclosed to their correspondents, to be forwarded to them after perusal, and Douglas, Anderson, & Co. had the option of forwarding the letters or not. There is no trust in equity, for the law, both at common law and equity, is governed precisely upon the same principles.

[The CHIEF JUDGE.—If there is an express appropriation by the remitter, equity attaches a trust, but it is not so in law, except the remitee has rendered himself liable.]

There is no case where equity raises a trust upon circumstances, amounting to appropriation, where the law would not raise an action of assumpsit. This is deducible from *Scott v. Porcher*; Sir William Grant says in the judgment, "This case is stripped of almost every circumstance that has ever been relied on, as constituting an irrevocable appropriation. H. & Co., who made the consignment, never informed P.

& Co. that any remittance was made or intended to be made, on account of the debt due to the latter. The consignees, who were mere factors for the consignors, had no directions to apply the produce of the consignment in payment of any specific debt, or in taking up any particular bill of exchange. The only order they received was, that when the sale should be effected, they should pay over the proceeds to Porcher & Co. They informed their principals that they would act in conformity to the directions received;" [that circumstance does not exist in the present case;] "but they had no communication whatever with P. & Co. upon the subject. This amounts to no more than a mandate from a principal to his agent, which can give no right or interest to a third person, on the subject of the mandate. It may be revoked at any time before it is executed, or at least before any engagement is entered into with a third person, to execute it for his benefit. And it will be revoked by any disposition of the property, inconsistent with the execution of it." Even if Douglas, Anderson, & Co. had sent to say that they would act according to the directions, that would not do. According to the principle laid down in *Williams v. Everitt*, there must be a positive contract. If a bill in equity were filed against Douglas, Anderson, & Co., there would be no jurisdiction, in conformity with the decisions, to make the order asked for.

[The CHIEF JUDGE.—There was a letter to Cotterill & Co., stating that the money was received for their benefit. The Master of the Rolls, in *Scott v. Porcher*, lays great stress upon that circumstance, of want of notice. Would it be competent to Douglas, Mackenzie, & Co. to revoke the order after the letters were sent to the parties? The letter stated a full remittance, and therefore it was necessary that Douglas, Anderson, & Co. should approve of it before it was sent, as they would have to make up the deficiency.]

The CHIEF JUDGE.—The claim advanced by the petitioners is upon the letter of the 31st of December 1836, by which Douglas, Mackenzie, & Co., remitted to Douglas, Anderson, & Co., certain bills of exchange, amounting together to 5,284*l.* 8*s.* 4*d.* The

petitioners say, that they are entitled to their proportion of the remittance, by virtue of that letter, which was written abroad, but did not arrive in this country till after the bankruptcy of Douglas, Anderson, & Co., whose assignees received the bills, and have realized the proceeds of part; and the question is, whether they are entitled to retain the proceeds, inasmuch as Douglas, Mackenzie, & Co., at the time of the bankruptcy, were indebted to Douglas, Anderson, & Co., or whether the proceeds are so appropriated as to belong to the persons for whose benefit they were consigned in 1836. None of the cases cited adversely seem to touch this case, for in all they were consignments of goods to be sold, or bills to be realized, with mere directions, when so sold or realized, to pay debts or hand over the proceeds to particular individuals. In some of the cases there was notice to the party for whose benefit the remittance was made, and in some no notice; but in all the cases the remittances were general, to realize and afterwards to pay certain individuals. In these cases, it was decided that the party for whose benefit the consignment was made had no lien, because, when the claim was made, the order had been either revoked by the party making the remittance, or it was a mere mandate, which continued revocable. The question therefore here is, whether this was a mandate revocable or irrevocable. There is no evidence that it was revocable, nor does it appear to be so; for it was not a remittance directing them to realize and pay; but it goes further, to remit bills as the property of individuals named in the letter, the three first bills to the Belgian company amounting to 769*l*. These bills were specially indorsed to the bankrupts for security, but still could be appropriated only to the Belgian company. The other bills, amounting to a large sum, which does not tally precisely with the claims, are remitted generally, as belonging to a *whole class of creditors*; not remitted to the agent directing him to pay, but as the letter says, "are belonging to, and on account of," and to be divided among the different persons named; but inasmuch as the amount of the debts of these parties was greater than the amount of the bills, the consignor

draws the attention of the London house to that fact, and points out reasons why they should pay the full amount. The effect of the letter is this: the bills sent belong to the individuals named; the proceeds of the bills are to be divided among them, and there is a request to the consignee to pay the residue, and letters are inclosed to the creditors, to be afterwards sent to them; so that there is not only a specific appropriation, but letters directed to the parties informing them of it. It strikes me, that the case is distinguished from all those cited adversely, by the circumstance of the specific assignment of the bills in question to the parties, three to an individual, and the others to a class of creditors; that these bills in the hands of Douglas, Anderson, & Co., belong to the individuals to whom they were appropriated, after the letter was sent to those individuals. And as to the next point, it does not appear that there was any revocation of the authority. If there is any claim on the part of the remitters, the question is left open, but this has nothing to do with the Singapore house, for we only decide that the assignees have no right to retain them, and that when the bills are thus remitted to them, they cannot apply them to other purposes. Here the bankruptcy intervenes, and the assignees having the bills, the proceeds belong to the party to whom they were stated to belong by the remitters. I think the order should go for the payment to the petitioners of that proportion of the money in the hands of the assignees, to which they are entitled, in the same way as in the Belgian case.

SIR J. CROSS.—The question in dispute is, whether the assignees should retain a fund come to their hands since the bankruptcy, to be paid over to certain individuals. The assignees received the sum of 734*l*. to be paid to the petitioners. This is not denied; but they raise a difficulty, in order to do that indirectly which they cannot do directly. It is urged, that they have a claim against the remitters to the whole amount. The real question is, whether this money is part of the bankrupt's estate. The assignees say, that if not, they have a right to retain it, because the remitters had a right to revoke their disposition of it; that is no right of the assign-

nees. We are here upon the question of the distribution of the bankrupt's estate: what is no part of that, we are bound to give to the real owners. Mr. Bethell has raised an ingenious argument upon the case of *Williams v. Everitt*, that the general principle is, that where a court of law will not interfere by considering an implied contract, a court of equity will hold that there is no trust; the consequence of which would be, that there would be no relief against a trustee having money of the *cestui que trust* in his hands. There is nothing in the case of *Williams v. Everitt*, which was a case at law, to prevent the Court here deciding the present question between the assignees and the petitioners. I am of opinion, that the petitioners are entitled to obtain from the assignees their proportion of the remittance come to their hands since the bankruptcy.

SIR G. ROSE.—I was not present when judgment was pronounced in the case of the Belgian company; but it struck me, on reading the petition, that the Court never had a clearer case, as there stated, to justify them in taking the property out of the hands of the assignees, and it occurred to me, had I seen the affidavits, to have intimated to the Court, that the order should have been a general order, as to all the parties interested, and that is the general practice. It is said, that the former case is under appeal; but till I hear a different result, I shall say, that there never was a case which more fully justified the doctrine of appropriation. It is said, the bills were specially indorsed to the bankrupts, and no doubt but by that all the legal property and controul is passed to the bankrupts, and from them to the assignees; yet we are not now to be told that though the property so passes to the bankrupts, this Court will not, upon petition, give relief; or that the mere fact of bankruptcy so determined the agency, that the Court now cannot act upon the property. There is a legal title in the bankrupts by the fact of the special indorsement, and the Court will always make the agency of the bankrupt a continuing agency. When the payments were forwarded for the goods consigned, the bankrupts were agents of Cotterill & Co., as agents for the Singapore

house, but bankruptcy intervening, the assignees get the bills, and say, they have a right to apply them to the general estate. Without going further, if it stood upon the habit of dealing, the mere habit alone would make the bankrupts agents for the shippers. If it is to be taken upon the letter accompanying the bills, "These bills are belonging to or on account of the following parties," and the letters of the remittees, "which, after perusal, we will thank you to forward," is not the Court bound to act, notwithstanding the jurisdiction may not attach; the question being, whether against the remitters there has not been an absolute appropriation, that is, whether the property has not irrevocably gone out of their hands? It is an admission on their part, that the remittee is a creditor to the full amount; and there is no possibility of the remitters recalling the fund, it being out of their hands, as so much money. The question is within the jurisdiction, by the right of the creditors to prove against the estate, the 734*l.*; and so the question is, between the assignees and the party claiming the benefit of the appropriation, a mere question of administration, how far the estate is to be relieved from proof. If the party, not coming within the jurisdiction, considers that the order of the Court has given to a third person funds to which he has no right, that party's right is no way concluded, for the Court only takes out of the hands of the assignees to give to a particular creditor. I am of opinion, that this is a distinct specific appropriation of bills come into the hands of the assignees, and to be applied by them to the trusts mentioned, that is, in favour of the petitioners. A special order, as to this fund, with liberty to the parties to make it a general order; as to the others, in *consimile casu*, if they think fit.

1837. }
Nov. 18. } *In re BROOME.*

Commissioner, Removal of—Solicitor.

Where a solicitor has acted as a commissioner under a fiat, the Court will not, at his own request, remove him from that office, in order that he may act as solicitor under the commission.

A solicitor had been named a commissioner in a country fiat, and had acted as such in the adjudication and in the choice of assignees.

Mr. Swanston now applied, on behalf of the solicitor, that the Court would relieve him of his office of commissioner, as the creditors were desirous that he should act as solicitor to the commission; submitting that, as the commission was directed to seven gentlemen, it could cause no interruption to the business of the fiat.

The CHIEF JUDGE.—He should not have accepted two incompatible offices. He chose to have his name upon the list as a candidate: this commission was directed to him, and he has acted under it. You cannot now call upon the Court to abrogate his appointment. It would be dangerous to establish such a precedent.

SIR J. CROSS.—There is no authority in the Court to dispense with the performance of a commissioner's duties when he has once commenced them.

SIR G. ROSE concurred.

1837. }
June 9. } *Ex parte* GOOD *re* ATKINSON.

Principal and Agent—Forfeiture—Compensation—Freight.

A merchant had consigned goods to a factor, in Denmark, and the goods were confiscated. Compensation was afterwards made by the English government:—Held, that the factor was entitled to be paid out of it for the freight.

In 1807, Atkinson, the bankrupt, consigned a cargo from England, in a neutral ship, *Fortuna*, to Good & Son, English subjects residing at Elsinore, Denmark. Before the ship arrived war was suddenly declared by England, and in consequence thereof, Good & Son refused to receive the consignment. The captain, anxious to receive the freight money, summoned Good & Son before the Sea Court of Copenhagen, to compel them to receive the consignment and pay the freight, and that Court made the following order: "The summoned John Good must, before three

settings of the Sun, after this sentence is legally made known to him, and under the penalty of thirty rix dollars to the poor funds, for every day it is not complied with, point out a convenient place of discharge for the plaintiff's vessel; and when the vessel has got to the place of discharging, without delay receive her cargo, and after that is discharged, to pay the freight, and that money amounting to 260 guineas of British money, as well as 4 guineas daily from the 10th of this month, until the day the place of discharge is fixed upon; and further, from the day on which the plaintiff reported his being ready to discharge, the demurrage."

Good & Son accordingly received the cargo, and paid the freight, &c., but as soon as the goods were landed from the neutral vessel, they were confiscated by the Danish government. During the war, all intercourse was forbidden to British subjects residing in Denmark, who were bound by an oath, and under penalty of confiscation of property, not to communicate with England. In 1810, Atkinson became a bankrupt, and peace was declared in 1814. Good & Son were desirous of being repaid what they had advanced for freight, &c., but, as claims had been made upon the British government for compensation, it was agreed that the demand of Good & Son should stand over, and form a lien upon the amount of compensation to be made. In 1834, the sum of 3,769*l.* was awarded to Patrick Johnson, the official assignee to the estate of Atkinson. The other assignees had died, as well as Good and Son; and the personal representative petitioned for the sum of 502*l.*, the freight and demurrage money, the petition praying that Good & Son might be declared entitled to a lien on the amount awarded as such indemnification for the sum of 502*l.*

On the petition coming on to be heard, the Court inquired whether the petitioner would submit to any order the Court might make.

Mr. Bethell, for the petitioner, consented.—The question is very simple, Atkinson's assignee having received the 3,769*l.* compensation money for the cargo, do not the same equities attach on it in his hands, as if Good & Son had actually received

the cargo? The money decreed by the Privy Council is in lieu of the property on which Good & Son had a lien. But supposing the lien does not extend to this fund, still Good is entitled to it, as the necessary legal consequence of the order in council. The acts of the King's enemies do not affect the rights of the King's subjects, so that if a vessel is captured, and the master turned out of her, still, if she is re-captured, the captain's lien for freight remains—*Ex parte Cheeseman* (1). The other side will possibly cite *Campbell v. Mullett* (2), but in that case, an alien was in partnership with two Americans, and the partnership property was confiscated. Compensation was awarded by commissioners to the Americans, and the alien was excluded from all claim on the fund for his share; and the partnership creditors were held to have no claim as against the separate creditors of the Americans. The respondents may also rely upon what the Master of the Rolls said in that case, and contend that this compensation money was a mere donation; but that case is not a precedent here, for the alien partner was expressly excluded from any share by the order of the commissioners. In this case, the bankrupt having been illegally deprived of his rights, the petitioner's claim for freight, &c. still remains, and revives with the grant of indemnity from our government; he has suffered loss, then why is he not entitled to a share of the relief awarded? What is meant by a lien?

[SIR G. ROSE.—A right to possess or retain.]

Yes, and it may be carried further—a right to be paid or satisfied out of a specific fund. Compensation money has always been considered as standing in the same character as the original. Now Atkinson gets back from the British government, compensation for the goods wrongfully taken by the Danish government, and the petitioner has a right to follow the money into the hands of Atkinson's assignee.

Mr. Swanston, for the official assignee.—There is nothing in common between the compensation money and the cargo upon which the petitioner claims a lien. The money is a newly-created fund by the

policy of the English government, and comes to him, not by his original proprietary right, but by a right newly conceded. No one denies the right or jurisdiction of the Court in Denmark to confiscate, and that sentence has never been reversed. All that the case of *Ex parte Cheeseman* establishes is, that a re-capture places things *in statu quo*. This is not a re-capture, and at the time of the bankruptcy, the bankrupt had no right upon which the claim or lien of the petitioner could attach.

Mr. Bethell, in reply, was stopped by the Court.

THE CHIEF JUDGE.—The Court is of opinion, that the petitioner is entitled to what he asks for. The fund in question was not awarded as compensation damages; if so, it would have been difficult for Good to have established any right of lien; but at the time the compensation was awarded, Good had paid as consignee, by the direction of Atkinson, a certain sum for freight. The cargo was seized by the Danish government after that payment, and this as well as other losses were incurred by British subjects. Our government, having thought it just to indemnify its subjects from the consequences of a sudden declaration of war, have placed the owners in precisely the same situation as if the cargo had never been seized; and the compensation money, representing the property seized, is subject to all the claims and interests of British subjects, which would have been available against the goods.

SIR J. CROSS.—The cargo was consigned to Good, and received by him as factor; he pays the freight and other charges, and is in possession of the cargo at the time it is seized—he is a British subject, and has suffered a loss. What right can the assignees of Atkinson have to retain Good's share of the compensation money?

SIR G. ROSE.—This claim cannot be sustained on the ground of lien. The jurisdiction of this Court over the assignees was in the nature of trying an action for money had and received to the use of the petitioner; if there were any doubt, it should weigh in favour of the petitioner; but I do not think a doubt exists.

Costs out of the estate.

(1) 2 Eden, 181.

(2) 2 Swanst. 551.

1837. }
Nov. 21. } *Ex parte* WARD *re* WARD.

Supersedeas—Practice—Old Commission.

The Court will not supersede an old commission on a mere affidavit that 20s. in the pound has been paid, although the commissioners, assignees, and other parties, are dead; but the Court will impound the proceedings.

A commission issued against Ward in 1811, under which he was declared bankrupt. In 1813, a dividend of 20s. in the pound was paid to all the creditors who had proved, but the bankrupt had neglected to obtain his certificate, or a supersedeas of the commission. Since the payment of the dividend, the bankrupt had purchased an estate, and had lately contracted for the sale of it. Objections to the title were raised by the purchaser, on the ground, that Ward was an uncertificated bankrupt. The assignees, the commissioners, and most of the creditors were dead.

Mr. Swanston applied for a supersedeas of the commission.

The COURT inquired who had been served.

Mr. Swanston.—There is nobody to serve. It would be most expensive to have procured the signature of the creditors who are alive, and of the representatives of all those who are dead.

[The CHIEF JUDGE.—You might have a renewed commission.]

There are no creditors. In *Twogood v. Neave* (1), Lord Eldon held, that he could not grant a renewed commission, where all the creditors had been paid in full. As there has been a valid commission, that will give the Court jurisdiction to supersede.

Per Curiam.—We have jurisdiction, if we could see our way to exercise it safely. How can we supersede a commission issued in 1811, upon the petition of the bankrupt in 1837, alleging, that all the creditors were paid 20s. in the pound? What proof is there that creditors entitled to interest have been paid their interest? It would be to annul everything that has been done by

the assignees under the commission. That the intended purchaser is not satisfied with the title, gives good reason that we should not grant this application.

Application refused.

Nov. 25.—*Mr. Swanston* again applied, that the Court would either supersede or in analogy to the proceedings in the Master's office, and with the practice of the Court of Chancery distributing assets, would direct an inquiry to ascertain whether there were any creditors.

The CHIEF JUDGE.—If it were established, that every bankrupt who had paid 20s. in the pound is entitled to a supersedeas, then it would be right for the Court to interfere, in order to ascertain that fact by a reference. But the inquiry asked would not advance you. The fact of 20s. being paid, is a good ground for the creditors assenting, or having their debts expunged. But it is always a question of indemnity to the assignees in superseding; and their personal representatives are not served. It would subject them to be called on to account for everything they have done under the commission, by reason of our taking out of the way that which justified their acts. There is no safe ground why the Court should set up such a precedent.

SIR J. CROSS.—The question is new and peculiar. There are two things for consideration, whether, under the circumstances, there is not reasonable evidence of the consent of the creditors; next, whether, under the circumstances, and after the lapse of time, there is not sufficient evidence of the signification of the commissioners. The impression on my mind is, that there is.

SIR G. ROSE.—We can do nothing more for you than to impound the proceedings.

The COURT made no order.

Mr. Swanston then intimated that he should apply to the Lord Chancellor.

The CHIEF JUDGE.—It is no question of appeal. But if the Lord Chancellor think there is sufficient evidence for him to remove the commission out of the way, he will do it.

(1) Buck. 65.

1837. }
Nov. 28. } *Ex parte* MAGEE *re* SLACK.

Supersedeas—Misdescription.

Where a bankrupt carried on his trade as a paper-manufacturer at one place, but had a warehouse where he transacted business at another, it was held not a misdescription to describe him as of the former place.

A fiat issued on the 3rd of October 1837, against the bankrupt, and he was therein described as "Robert Slack, of Hefield, paper-manufacturer." It was alleged, that the right name of the place where the bankrupt manufactured his paper and also resided was "Heyfield;" and that there was also a defective description, inasmuch as the bankrupt carried on the principal part of his trade at Sheffield, where he had a large warehouse, and where he was most generally known as a trader.

The petition prayed that the fiat might be annulled, and that a new one might issue at the instance of the present petitioner.

Mr. Swanston, for the petition:—The name of the bankrupt's residence is wrongly spelt, and his principal place of trade omitted.

[*SIR G. ROSE*.—Have you evidence that any inconvenience has resulted from not appending the further description?]

A case of misdescription is enough without that.

[*THE CHIEF JUDGE*.—This is not the case of parties coming to the office at the same time, one with the addition, and the other without it.]

The place of his manufacture is not the place of his trade. As well might the laboratory of a chemist be called the place of his trade. Sheffield was the place of his general business for buying and selling.

[*THE CHIEF JUDGE*.—Have you any case where such a misdescription has been held sufficient ground for a supersedeas?]

In *Ex parte Parry* (1), the bankrupt was described as of Sutton, Surrey. It appeared from the evidence, that he had for some years resided and traded at Bath, and had only quitted it a few months previous to the issuing of the commission. The Vice Chancellor considered the omission of all

reference to Bath, where chiefly the bankrupt was known as a trader, and where the body of creditors might naturally be presumed to reside, was as much calculated to mislead as if he were described of a place where he had in reality never been. In the present case, the place where Slack carried on his trade is omitted altogether.

THE CHIEF JUDGE.—I never heard an application with so little foundation. The fiat issued against a paper-manufacturer, at Hefield, and the first objection raised is, that the place of the manufacture was Heyfield, and the petition does not allege that it is not *idem sonans*; and, besides, there is no motive for misdescription. Next, as to the defective description. It is said, that the place where the paper was manufactured was not the place of his trade. But that was the place of his trade; because, there, he purchased all his goods, and made them up, which the act declares a trading. It is not necessary that the bankrupt should be described as of every place where he has a warehouse. The question is, then, whether there has been any omission tending to deceive. The case cited was of that description, because the only place where the bankrupt was known as a trader had been omitted.

SIR J. CROSS and *SIR G. ROSE* concurred.

Petition dismissed, with costs.

Nov. 10, 1837. } *Ex parte* BOLTON *re*
Jan. 15, 1838. } BENTLEY.

Bill of Exchange—Undertaking to accept—Proof.

A, agent of B. & Co., is sent abroad to purchase goods; and, for that purpose, is authorized to draw bills upon B. & Co., and by sale or negotiation of the same, to raise money for the payment of the goods, B. & Co. undertaking to the agent to honour such bills when presented in Liverpool. A bill, drawn by the agent accordingly, is discounted by C, and by C. indorsed to another, and by him to the petitioner, all parties having notice, at the time of taking the bill, of such authority and undertaking on the part of B. & Co. Before the bill arrived at Liverpool, B. & Co. had become bankrupt. Issue

(1) 2 Glyn & Jam. 225.

granted, whether, according to the custom of merchants, these circumstances amounted to an acceptance of the bill when drawn by B. & Co. The issue was declined, and the petition dismissed with costs. The assignees, under the circumstances, ordered to retain the dividends on the amount of the bill, to enable the parties in America to tender another proof.

J. Bentley, as agent of the firm of Bentley & Co. trading in Liverpool, was sent out to America for the purpose of purchasing goods, and the firm, not having the command of ready money, authorized him to draw upon them bills of exchange, and to sell or otherwise dispose of the same, and apply the proceeds in the purchase of goods, and undertook to J. Bentley to accept or honour the same when they arrived in Liverpool. The bill which was the subject of the present petition, was drawn by J. Bentley upon the bankrupts, and was as follows:—

“New Orleans,

“18th of February 1837.

“Messrs. Bentley & Co.

“Sixty days after sight, pay to R. Redmond or order, \$3,000*l*.

“J. Bentley.”

It was discounted by Redmond upon the representation of J. Bentley, of the authority and undertaking on the part of Bentley & Co.; but before it reached Liverpool, Bentley & Co. had become bankrupt. The proceeds of the bill had been applied by the agent in the purchase of cotton, which, on its arrival in Liverpool, was received by the assignees, and sold for the benefit of the creditors. The bill was indorsed by Redmond to another person, with notice, and by him indorsed to the petitioners, also with notice. The affidavit of J. Bentley, deposed to the agency, the authority to draw, and the undertaking to accept, and that when he negotiated the bill, he pledged the credit of the bankrupts. The petitioners also deposed, that in taking the bill, they gave credit to the firm of Bentley & Co. The petitioners prayed to be allowed to prove the amount of the bill, which the commissioner had refused.

Mr. Swanton and Mr. Booth, for the petitioners.—This bill was drawn by the agent of bankrupts, who were under an

engagement to accept bills so drawn, and the proceeds are in the hands of the assignees. Before the bankrupts, however, could accept it, the English disability of bankruptcy intervened.

[The CHIEF JUDGE.—Your right is solely upon a bill to which the bankrupts are no parties.]

[SIR JOHN CROSS.—But you ground your right upon the previous promise to accept.]

A legal undertaking to accept, is equivalent to acceptance; and the individual who holds the bill, would have an equitable debt.

[SIR GEORGE ROSE.—The only question raised upon the petition, is the legal right to prove upon the bill, and that will follow upon the legal right of action. Now, the bankrupts were not the drawers of the bill, but only promised to accept it.]

The substance of the transaction was, that the credit of the house should be pledged. It was competent to J. Bentley, as agent, to charge his principals as drawers of the bill.

[SIR JOHN CROSS.—The question is, whether the promise to accept goes along to all the holders of the bill.]

If a promise to accept is once equivalent to acceptance, it must be so always; and here it goes to all the holders, because they gave credit on the faith of the undertaking. It was certainly not the intention of J. Bentley that his individual credit should be pledged; and, if any person had recovered against J. Bentley, he might have recovered against the firm.

[The CHIEF JUDGE.—Not on the bill, but upon the promise.]

The first proposition is, that by the act of J. Bentley in drawing the bill, his principals, who authorized him, are bound. If not so, yet, according to *Jackson v. Hudson* (1), the undertaking to accept is equivalent to acceptance.

[The CHIEF JUDGE.—There the undertaking did not proceed from the original maker of the bill. In *Johnson v. Collings* (2), a promise to pay a non-existing bill, was held not to amount to acceptance.]

[SIR JOHN CROSS.—I remember a case in this court, where the promise of a lien travelled into the hands of a stranger.]

(1) 2 Campb. 447.

(2) 1 East, 96.

[The CHIEF JUDGE.—There the goods were pledged to the payment of the bill.]

Johnson v. Collings is distinguishable from the present case, as there the bill-holder was a stranger to the agreement at the time he took the bill; and all the Judges concurred upon the point, that an indorsee so situated could not recover upon the bill. Lord Kenyon, in his judgment, lamented that anything beyond an acceptance in writing was held good. *Pierson v. Dunlop* (3) carried the doctrine to the utmost verge of the law.

[The CHIEF JUDGE.—This case goes a step further, for this is a promise to honour all bills that should be drawn, to any amount.]

But, in a particular transaction, on one side there is the doubt of Lord Kenyon, on the other, the authority of Lord Mansfield, and also of Mr. J. Le Blanc. The right on proof need not be strictly legal, but equitable; and the petitioners are purchasers for valuable consideration.

[SIR GEORGE ROSE.—As it stands upon the bill, the question both at law and equity is exactly the same. There may, indeed, be a proof independent of the bill.]

There was an agreement between the parties for valuable consideration, on which Redmond must have obtained redress.

[The CHIEF JUDGE.—By what process?]

By bill in equity. The agent of the bankrupts purchases certain goods, and obtains money from Redmond upon the credit of the bill.

[SIR GEORGE ROSE.—No such case is raised upon the petition. It is a distinct thing to say, you have an equity against the particular goods, and an equity against the general estate. The questions are, whether from the representations of the mode in which the bill came into your hands, it can be considered as an acceptance; next, whether you are not confined to the strict case upon the bill; and lastly, whether you have any equitable right. You have shaped your case as upon the acceptance of the bankrupts, and you are here upon the rejection of your proof upon the bill; and the question is, whether the words, "that his principals would honour the bills," amounted to an acceptance.]

(3) Cowp. 571.

[The CHIEF JUDGE.—In the case of inland bills, there is a right of action if a person undertakes to accept; but not upon the bill. You must get at the fact, that the bill was virtually accepted before the bankruptcy. The facts of this case carry the question much further than the cases cited, for in them the amount and the bill were particularized. You have no authority to say, that it is an acceptance within the custom of merchants, though the authority given by the bankrupts might have induced other persons to take it. That is a question of fact, and must be left to a jury.]

[SIR GEORGE ROSE.—You may try that question, by bringing an action against the bankrupts, the assignees defending it.]

[The CHIEF JUDGE.—You may have an issue, whether, before the bankruptcy, Bentley & Co. had accepted this bill according to the custom of merchants.]

Whether an acceptance or not, the petitioners have a right of proof. Consider Redmond as the petitioner. Bentley, the agent, received Redmond's money, which he remitted in the form of goods to Bentley & Co. Bentley & Co. are now in a state of insolvency; Redmond may follow into their hands, that money which is the fruit of their fraud and breach of engagement.

[SIR JOHN CROSS.—Was there ever an instance where a man having parted with money could follow it? A principal may follow money when the agent loses it, but can he in the case of a bill of exchange?]

It is the constant practice in courts of equity.

[The CHIEF JUDGE.—Suppose Redmond lent money to Bentley & Co., then he is a creditor to that amount; but how can he transfer that debt to Bolton, the petitioner?]

The agent obtains money from Redmond, upon the representation that Bentley & Co. would accept the bill drawn; therefore, it is a fraud.

[The CHIEF JUDGE.—If you could follow goods, that does not give you a right of proof upon the bill. It is not possible for Redmond to assign his debt to Bolton, except by the custom of merchants.]

If there is shewn a transfer of Redmond's right, that is sufficient in a court of equity; for all that is necessary to be established in

a court of equity, is an agreement *bond fide*, and for good consideration, and no law against it.

[SIR G. ROSE.—The question whether any goods in the hands of the assignees are pledged to the payment of this money, does not arise upon the petition; nor will it be affected by the judgment upon this petition.]

[THE CHIEF JUDGE.—The question to be decided is, whether the circumstance of an authority to draw and an undertaking to accept, and a person taking it upon the faith of that authority, would amount to an acceptance, so as to pass to all the holders of the bill. In the case of *Johnson v. Collings*, there are only the conflicting opinions of Lord Kenyon and Le Blanc, J., but no decision.]

Mason v. Hunt (4) was a case of bills, not drawn to an unlimited amount.

[THE CHIEF JUDGE.—No question was decided there; for as the agreement was worded, it would have been an acceptance if the conditions had been performed: an agreement may amount to an acceptance.]

As the bill was drawn by Bentley & Co. through their servant, it must be considered as their bill.

Mr. Sturgeon and *Mr. Ayrtton*, for the assignees, were not called upon by the Court.

THE CHIEF JUDGE.—The only question really worth considering on this petition is, whether the authority given by Bentley & Co. to their agent in America, to draw bills for the purpose of purchasing goods, coupled with an undertaking to accept, amounted to an acceptance of the bill *when drawn*; provided any person was induced upon the faith of that representation to discount it. Two questions will then arise: viz. whether the bankrupts were the drawers or acceptors of the bill? because, if they were either, then the petitioners by the custom of merchants are entitled to prove. They were not drawers, because the authority was not given to draw in the name of Bentley & Co., but to draw upon them; and it is plain, that J. Bentley, the agent, understood his authority in that light, from his not signing the bill as agent, but sign-

ing in his own name as drawing upon Bentley & Co. Secondly, are the bankrupts acceptors of this bill? There is no case which has carried the point so far as to decide that a party is liable upon a bill as acceptor, merely in consequence of an authority given to draw; and I do not feel inclined to carry the law further, especially as I find, that in *Johnson v. Collings*, Lord Kenyon doubted whether, in the case of a particular bill, drawn on the express undertaking of the party to accept it, given before the bill was in existence, such an undertaking would amount to an acceptance in law. Without the authority of a jury that such is the custom of merchants, I would not disturb the decision of the commissioner. If, therefore, the parties do not choose to take an issue upon that fact, the petition must be dismissed; but if the question is to be tried in the form of an issue, whether it is an actual acceptance within the custom of merchants, I should be glad to give an opportunity for that purpose.

SIR J. CROSS.—There are three questions: First, were the bankrupts the drawers? Secondly, were they acceptors in law? Thirdly, have the petitioners a right to prove in respect of their equity? As to the first, the bill was drawn by J. Bentley in his own name, but by the authority of the bankrupts, they undertaking to accept it. If an agent buy goods for his principals, though he do not name them, yet they are liable. If he borrow money for them, an action will lie against principals and agent; therefore, if this were a question of goods sold, or money lent, I should be clearly of opinion, that the petitioners had a right to establish the proof. But the question here is, whether they have a right to consider the bankrupts as the drawers, though they are not named as such upon the bill. No authority has been cited to shew, that in any instance the drawer who draws in his own name has ever been considered as representing his principal. As to the second question, it seems to me to be a nice point of law; because the authorities establish this, that a merchant may, by undertaking to accept an undrawn bill, be considered as an acceptor. If there had been an express undertaking in this case by the bankrupts to the petitioners, I should

be of opinion, that under the authority of *Pillans v. Van Mirop* (5), they must be taken as acceptors. But this is a different case still; for here is authority to draw. If a man gives authority to another to draw a bill upon him, he undertakes to the drawer that he will duly accept it; and I take this to be a distinct undertaking to J. Bentley, that this bill should be accepted. But, then, no case has ever decided, that where such an undertaking is given to the drawer, it will follow the bill as an acceptance, though the holder may be an utter stranger to the undertaking. The case of *Johnson v. Collings* leads to the contrary conclusion: there, an express undertaking by a debtor with his creditor, that if he drew a bill upon him at a certain date, he would pay it, was held no acceptance. No communication was there made to the indorsee at the time of taking the bill. Here, the promise was not latent, for the agent communicated it to the discounter, and he to the present holders, the petitioners; but still there is no case establishing that, according to the custom of merchants, this amounts to an acceptance. If an action at law were brought, the allegation must be that the bankrupts, according to the custom of merchants, did accept; but the question of custom and usage is to be decided by the jury. When the jury find the custom, the Courts consider it the law of the land. I consider this a fit case on which to take the opinion of a jury. As to the third question, it is said, that in equity, all the rights upon this debt, which, according to the present statement, is owing to the first discounter, belong to the petitioners. It is a debt for money lent; yet I cannot see why the petitioners should be allowed to establish a proof in respect of their equitable right, on account of any claim they may have against the discounter; for it may be that the discounter owes so much money to the estate. It should be put to the jury, whether it was an acceptance at the time it was drawn. The agent was authorized to draw upon the bankrupts, and their undertaking was, that they would accept in Liverpool, which seemed to reserve to them some option, whether they would accept upon the arrival of the bill, otherwise what would have prevented

J. Bentley from writing on the bill, "Accepted by procuration of the bankrupts"?

SIR G. ROSE.—This is a question of fact, not very difficult of solution. There seems no other result than that arrived at by the commissioners. Is there such an acceptance as the law will imply, or a virtual acceptance? for the case against the bankrupt's estate must stand upon the bill. Where such a question is raised, nothing less will satisfy the Court than a direct clear authority, otherwise the argument *ab inconvenienti* will at once turn the scale; because it is out of the range of the ordinary transactions of agents. The mere fact of the drawing does not pledge the acceptance of the drawer. When value is given for the bill, he does not say, he has authority to accept, nor is it so put. All that is stated is some general representation, that he took the bill upon the faith that it would be honoured—that is, consistent with ordinary transactions; but it is quite a different thing to say, that it amounts to acceptance. Was there authority to J. Bentley actually to accept the bill when he handed it over? for that is the fact we are to find out, and it must be so left to a jury; it must be an acceptance before the bankruptcy or not at all. If the agent was so authorized, there would be no difficulty. If the parties think, that by evidence they can get at such authority, they may have an opportunity.

Jan. 18.—The petition was ordered to be dismissed, with costs, unless the petitioners elected to take an issue within a certain time. This they declined, and the petition was dismissed accordingly; the assignees being ordered to reserve the dividend on the 3,000*l.*, until the beginning of next term, to enable the parties in America to tender another proof.

1838. }
Jan. 19. } *Ex parte BURRELL re ———.*

Equitable Mortgagee—Rents.

An equitable mortgagee, by giving notice before the bankruptcy of the mortgagor to the tenants, not to pay their rents to the mortgagor, will not be thereby entitled to the rents previous to the order for sale.

(5) Burr. 1663.

The petition in this case was heard on the 8th of March last, when the petitioner was declared equitable mortgagee, and an order was made for the sale of the premises, and further directions were reserved. The sale had since taken place, and the proceeds thereof were insufficient to cover the mortgagee's debt. Previous to the bankruptcy, there being certain rents due in respect of the mortgaged premises to the mortgagor, the bankrupt, the mortgagee had given notice to the tenants not to pay the same to the mortgagor, and the rents had remained unpaid up to the present time. The case now came on, on the further directions. The petitioner claimed to be entitled to the rents from the date of his notice. The assignees appeared to resist the claim.

Mr. Swanston and Mr. Rogers, for the petitioner.—The mortgagee having given notice to the tenants not to pay their rents to the mortgagor, and the rents not having been paid, is the mortgagee or the assignees entitled to them? The question will be, from what time the rents belong to the mortgagee?

[The CHIEF JUDGE.—From the date of the declaration that he is equitable mortgagee, and the order for sale.]

But, here, the mortgagee has taken the first step to perfect his right by the notice.

[The CHIEF JUDGE.—As between the assignees and the mortgagee, there has been no interference by the mortgagee with the legal rights of the mortgagor.]

In *Garry v. Sharratt* (1), where an insolvent had deposited title-deeds as a security, previous to his discharge, and had given a verbal authority to the mortgagee to receive the rents, it was held, that the assignee could not recover from the creditor the rent he had received, after the insolvent's discharge; for the assignment under the Insolvent Act passes to the assignee only, what the insolvent was entitled to at law and in equity.

[SIR G. ROSE.—That was a question of equitable right to retain money received by the mortgagee. Could the tenants have set up that notice as a defence, to a demand of rent by the mortgagor?]

Where a fund is *in medio*, and a question

who is entitled to it arises, and such a notice has been given, the petitioner has the decision of a court of law in his favour.

[SIR J. CROSS.—The fact of the payment of the money was the only thing that brought the question before the Court.]

In *Sumpter v. Cooper* (2), title-deeds were deposited as a security, and there was afterwards an assignment of the same property to the creditor, but not duly registered. The debtor became bankrupt, and the assignment under the bankruptcy was duly registered. An action was brought by the assignees against the creditor, for the rents received since his assignment; it was held, that the instrument was void; yet the rents which he had received as equitable mortgagee, could not be taken out of his hands, by virtue of the bankruptcy assignment. The petitioner claims the same right. The fact of having "received" the money, is not essential to this Court to raise the jurisdiction. The distinction in this case is, that the property remains *in medio*, because of the notice. It is a question between two equities, and the mortgagee has obtained a prior right by the effect of his notice.

Mr. Swinburne, for the assignees.

The CHIEF JUDGE.—The former cases have settled that the right of an equitable mortgagee to the rents of the estate, commences only from the date of the order of sale. It does not appear to me, that notice makes any difference. It is much better to abide by that rule, that all equitable mortgagees may understand their situation, than to make nice distinctions. A legal mortgagee gives notice to the tenants, because it is the only way in which he can take possession; but an equitable mortgagee has no right of action against the tenants, and if the mortgagor were to bring an action against the tenants, they could not set up the notice as a defence. I am, therefore, of opinion, that the right accrues only from the date of the order of sale, and that the alleged notice makes no difference.

SIR J. CROSS.—The established rule is no hardship upon an equitable mortgagee, because he has the power of immediately

(1) 10 B. & C. 716; s. c. 8 Law J. Rep. K.B. 306.

(2) 2 B. & Ad. 323; s. c. 9 Law J. Rep. K.B. 326.

coming to this Court, and getting his order, and is then entitled to the accruing rents after that day. Besides, it is not inconsistent with general principles, that a party asking extraordinary relief, should be put under the terms of taking no rents till the date of the order. If notice were to have the effect of an order, a party might lie by as long as he pleased. Therefore, I think, the established rule reasonable.

SIR G. ROSE.—If an equitable mortgagee giving notice were so entitled to the rents, it would make his a preferable title to that of a legal mortgagee. In a bill filed in Chancery, the Court will not give you a receiver till the answer admits the equitable title; and the Court follows the same practice here, if the Court gives you a receiver, when the assignees put in their answer. It is the right and the regular practice.

The common order: all costs out of proceeds of the sale.

1838. } *Ex parte* THORPE *re* TEES-
Jan. 20. } DALE.

Equitable Mortgage—Costs.

Where there is an equitable mortgage, with a memorandum as to part of the property, and none as to the other, the costs will be apportioned.

Order made for sale of the mortgaged premises, but declaration that petitioner was equitable mortgagee, postponed until the commissioner had certified the date of the deposit:—Held, that the petitioner was entitled, notwithstanding, to the rents, from the order of sale. After that order, the assignees are in the nature of a receiver.

The petitioner, in this case, as equitable mortgagee, had obtained an order of sale. As to one portion of the property, there was a memorandum accompanying the deposit, but not so as to another. The case now came on first as to the costs.

Mr. Swanston and Mr. Abrahams, for the petitioner, asked that he might be allowed his costs, as to the property included in the memorandum.

Mr. Walker, for the assignees.—It was

held otherwise in *Ex parte Robinson* (1), which was a case similar to the present. There, the equitable mortgagee had to pay all costs.

Per Curiam.—The fair way in these cases is to apportion the costs.

As to the rents accrued since the date of the order for sale, there being some doubt as to the date of the deposit, the Court refused to declare the petitioner equitable mortgagee, till the commissioner had certified the date. The certificate of the commissioner was in favour of the petitioner, who now claimed to be entitled to the rents from the date of the former order for sale.

Mr. Swanston, for the petitioner.

Mr. Walker, for the assignees.—The Court departed from its usual course, because the petitioner had not established his title. The usual practice is, to declare the petitioner equitable mortgagee, and then order a sale. So, in the Court of Chancery, the decree for a sale is not made till the mortgagee has established his title. The petitioner, here, is not entitled to the rents till he has made out his title.

The CHIEF JUDGE.—There was a suspicion that the deeds were not deposited at the time alleged, and an absolute declaration was refused; but it was referred to the commissioner to certify the time. That certificate is in favour of the petitioner. I think, then, he ought to stand in the same situation as if we had given full credit to his statement. The order of sale was tantamount to the appointment of a receiver.

SIR J. CROSS concurred.

SIR G. ROSE.—The Court, in making the order of sale, interposed as a trustee for those persons who should be found entitled to it. Take the principle of a receiver, and the analogy will give the rents to the petitioner. The assignees are in the nature of a receiver.

Order—That the petitioner is entitled to the rents from the date of the order of sale.

(1) 1 Dea. & Ch. 119.

1837. }
Nov. 11. } *Ex parte FIELD re FIELD.*

Reversal of Adjudication—Time granted to supply Defect of Evidence.

On an affidavit that the respondents are unable to procure an affidavit from a material witness, the Court will give time to subpoena such witness for vivâ voce examination.

A petition to reverse, presented after the two months have expired, if it go to the whole merits, will be entertained under the general jurisdiction.

This was a petition for the reversal of the adjudication, on the ground that there was not a good petitioning creditor's debt. The petitioning creditor had signed a deed, by which the bankrupt assigned over all his goods for the benefit of his creditors.

Mr. Swanston, for the petitioner, stated, that the petitioner did not know what was the act of bankruptcy relied upon.

Mr. Anderdon, in opposition.—The petitioning creditor signed the deed upon condition only that the assignees of Forester, a creditor of the bankrupt, should sign, which they did not; so that the debt is a good petitioning creditor's debt. If the execution of this deed by the bankrupt was no act of bankruptcy, other acts of bankruptcy could be proved; but it is alleged, that a necessary and material witness is kept out of the way, and an affidavit from him cannot be procured.

[SIR G. ROSE.—That is not in evidence here.]

[THE CHIEF JUDGE.—The bankrupt must then have a supersedeas, unless you ask for time, as in *Ex parte Bypond* (1); see also *Ex parte Bilbald v. Bilbald* (2).]

[SIR G. ROSE.—The Court will look at the proceedings, and if it finds no act of bankruptcy upon them, then the bankrupt is entitled to a supersedeas; but you may then apply for time to have an issue, if you have any person who makes an affidavit that a witness keeps out of the way.]

There is also another objection. This is a petition to reverse the adjudication, and should be brought within the two months, under the 1 & 2 Will. 4. c. 56.

(1) 1 Mad. 624.

(2) Buck. 270.

Per Curiam.—As the petition goes to the whole of the bankruptcy, it will come within the general jurisdiction.

1837. }
Nov. 13. } SCOTT v. WESTERN.

Security for Costs—Practice.

Where a petitioner states himself to be out of the jurisdiction, the practice is to stay the proceedings till security is given for costs; and this order will be made upon an *ex parte* application.

This was a petition of Scott, who described himself in the petition as of Greenock, and it prayed that he might be declared to have an equitable lien upon a certain policy of insurance.

Mr. Swanston, for the petitioner.

Mr. J. Russell for the assignees.—The petitioner is out of the jurisdiction, and has already refused to enter an appearance in an action brought by the assignees. Before the Court entertains the petition he must give security for costs.

Mr. Swanston objected that the petitioner had had no notice of this application.

Mr. J. Russell.—There is no one upon whom to serve a notice. In the Court of Chancery, these *ex parte* applications are always granted as a matter of course.

[SIR G. ROSE.—Your application should be, that the petitioner bring the policy into court.]

Mr. O. Anderdon—*amicus Curie*.—The usual order made in the Court of Chancery is to stay the petition till security is given.

Per Curiam.—Take an order for staying proceedings till security is given for costs.

1837. }
Nov. 23. } *Ex parte BAILEY re BAILEY.*

Practice. — Protection of Bankrupt — Costs

The appointment of a meeting to take the last examination of a bankrupt at his request, after the forty-second day, and his examination having been adjourned sine die, does

not operate as a protection between the time of appointing the meeting, and the day appointed to take such examination.

Case of a petition dismissed with costs, against an uncertificated bankrupt.

This was the petition of William Bailey the elder, a bankrupt, praying an order that the plaintiff in an action, who had arrested him, might order his discharge from arrest, and the consequent proceedings, or consent to an exoneretur being entered on the bail-piece. The petition stated, that the petitioner and William Bailey, jun. were found bankrupt the 22nd of October 1836; that the commissioner had appointed the 7th of November and the 6th of December for taking the last examination of the bankrupts; that on the 23rd of December the commissioner adjourned the last examination *sine die*, and refused to sign their protection; that on the 9th of June 1837, the younger Bailey applied to the commissioner to appoint a day for passing their last examination, which he named for the 23rd of June; that on the 19th of June the petitioner was arrested on the writ; that he applied to Gurney, B. at chambers, for his discharge from the arrest, but he refused to interfere, because the petitioner could not shew the commissioners' protection. The affidavit in opposition stated, that the last examination was adjourned *sine die*, on account of the dissatisfaction of the commissioner, and that the writ was issued on the 30th of May, and the petitioner was aware of it before he made the application for a meeting.

Mr. Swanston, with whom was *Mr. Teed*, for the petitioner.—It would appear, from the 117th section, that it is not the summons that protects the bankrupt, but the appointment by the commissioner, which protects him, for the act says, "If such bankrupt shall be arrested for debt, or on any escape warrant, in coming to surrender, or shall, after his surrender, be so arrested, within the time aforesaid, he shall, on producing the summons under the hands of the commissioners to the officer who shall arrest him, and giving such officer a copy thereof, be immediately discharged;" then follows the penalty for detaining the bankrupt, shewing that the summons acts as mere evidence or a record of a fact, and not as if the pro-

tection itself was dependent on it, and no one would contend that the mere circumstance of the bankrupt having walked out without taking his summons with him, would authorize an officer, who knew he had been summoned, to arrest him.

[*The CHIEF JUDGE.*—The protection under the 117th section is quite independent of the indorsement; the protection under the 118th section depends upon the commissioners' indorsement: but the question here is, whether, after an adjournment *sine die*, the bankrupt is protected between the day he gets the appointment and the day for taking his examination.]

The time between the 9th of May and the 23rd of May must be regarded in the light of further time for taking his examination, otherwise how could he take the necessary steps by investigating his books and accounts of his assignees? If he is not protected, the extension of time is useless; he is allowed access to his books by the act of the legislature; how then can it be supposed he is not to be protected in the exercise of such right? If it were not so, the mere circumstance of an adjournment *sine die*, would amount to perpetual imprisonment; for how could he ever give a satisfactory account?

Mr. Anderdon, for the respondent, was not called on by the Court.

The CHIEF JUDGE.—We are of opinion that this application cannot be granted. The 117th section gives the bankrupt freedom "from arrest or imprisonment by any creditor in coming to surrender, and after such surrender, during the said forty-two days, and such further time as shall be allowed him for finishing his examination, provided he was not in custody at the time of such surrender; and if such bankrupt shall be arrested for debt, or on any escape warrant, in coming to surrender, or shall, after his surrender, be so arrested within the time aforesaid, he shall, on producing the summons under the hands of the commissioners to the officer who shall arrest him, and giving such officer a copy thereof, be immediately discharged." It is quite clear the legislature was contemplating the protection for the forty-two days, and such further time as the commissioners thought requisite; and the former acts carried it no

further; and the 118th section contemplates an enlargement of time or an adjournment of the examination *sine die*, when the commissioners may, by indorsement, give a protection, which the legislature has expressly limited to three months. But then it was contended, that inasmuch as a commissioner could by the 117th section grant "such further time," that the appointment of a meeting, although after an adjournment *sine die*, and the expiration of the forty-two days, was a granting of such further time; it appears to me, that the language of the 117th section will not bear such a construction. It is admitted, however, that he was not protected between the adjournment *sine die*, and the day on which the commissioner made the appointment: then, how can it be contended that it falls within the provision which allows the commissioner to grant further time expressly from the forty-second day? We therefore consider he was not protected, except in going to and coming from the place of examination; and this application cannot be entertained.

SIR J. CROSS.—I was at one time inclined to think, there was an apparent reason for our attending to this application, although not supported by the practice in former times, or any subsequent enactments; but I look also at the circumstances of this case as well as the law, and they appear very like a mere contrivance to avoid an arrest; for it does not appear that any attempt had been made to pass the examination, until the petitioner had been informed that a writ had been sued out against him.

SIR G. ROSE.—It has been argued, that unless we hold that the bankrupt was protected, we must declare, that he had no right to examine his books or accounts; but that does not follow; for the right to inspect his accounts, and the right to be protected from arrest, are two distinct rights given him by statute. Let us look at the practice, both before and after the 6 Geo. 4. c. 16; is it not the general practice, that further time means further time necessary for passing his last examination, after the 42nd day? The 118th section was passed to prevent a generally received opinion, that if a commissioner adjourned the

bankrupt's last examination *sine die*, he had discharged his authority altogether.

Petition dismissed, with costs.

1838. }
Jan. 16. } *Ex parte SCOTT re SHIRLEY.*

Quorum Commissioner's Fee—Practice.

It is the duty of the solicitor to the fiat to summon the quorum commissioners, and tender them the legal fees; and it will be no answer to a petition by a quorum commissioner, that the solicitor had known him on a former occasion to demand more than the legal fees.

Semble—when two meetings take place on the same day, although under different fiats, the quorum commissioner is only entitled to one fee for travelling expenses—per The Chief Judge and Sir G. Rose.

This was the petition of a Mr. Scott, of Stourbridge, in the county of Worcester, a barrister, and one of the quorum commissioners for that district. It stated, that on the 14th of September last, a fiat had been issued against a trader named Jones, and directed to the petitioner, Abraham Turner, esq., and others; and that George Price Hill and Henry Maddocks Daniel, were the solicitors to the fiat; but that, notwithstanding the petitioner was at Stourbridge, and willing to have attended, the solicitors had neglected to summon him to the several meetings which had been held; and it prayed, that the proceedings which had been held under the fiat might be declared void, and the petitioner duly summoned in future; or that the solicitors might be ordered to refund to the petitioner such fees as he would have been entitled to, had he been regularly summoned; and in either case to pay the costs of the petition.

This was met by the respondents, one of whom in his affidavit stated, that they had not summoned "the said Robert Scott, because the said Robert Scott, in the judgment of this deponent, and the said G. Price Hill, this deponent's co-partner, charges, demands, and receives improper and illegal fees, for attending and acting as a commissioner under fiats in bankruptcy.

And this deponent saith, that he and his co-partner, about the 7th of July last, sued out a fiat against James Hill, of Stourport, in the county of Worcester, tailor, directed to Robert Scott and the other commissioners, and on the 20th of July, another fiat against John Griffiths, in the county of Worcester, hallier; that the said Robert Scott demanded and received 3*l.* from the deponent for attending the meeting, which deponent believes to be illegal and improper, as the said Robert Scott does not reside seven miles from the town of Kidderminster; that on the 10th of August last, a meeting was held under the fiat against James Knight, and on the same day, shortly after, another was held under the fiat against John Griffiths, when Mr. Scott attended and acted as a commissioner, and received 3*l.* for each of the meetings; and also that on the same day another meeting was held under a fiat against Henry Widnell, of Kidderminster, at which Mr. Scott attended, and received illegal and improper fees for travelling expenses; that the commissioners had taxed off from the bill of deponent the sum of 1*l.*, being the charge for travelling expenses paid to Mr. Scott; that the distance from Mr. Scott's house to the town of Kidderminster was not more than six miles six furlongs and three yards."

Mr. Bethell, for the petitioner.—This petition is attempted to be met by the respondents alleging, that Mr. Scott was in the habit of charging illegal fees; the respondents erecting themselves into a tribunal to judge of their illegality, and to punish the offence.

[*Per Curiam*.—Do they say they ever tendered the proper fees to Mr. Scott?]

There is no such allegation, and the excuse set up is an aggravation of the offence.

Mr. Swanston and *Mr. J. Russell*, for the respondents.—The question is, whether the commissioner is entitled to a penal order against the solicitors to the fiat, before the choice of assignees, or whether the reason stated in the affidavit, that Mr. Scott was not summoned, because he had received illegal fees on former commissions, and refused to attend without such fees, is sufficient? Now, by section 22 of 6 Geo. 4. c. 16, a commissioner who takes

improper fees is for ever disqualified; and, therefore, where the fact of his having taken such fees has come to the solicitor's knowledge, he is bound not to summon such commissioner; for all the acts he might perform would be null and void.

[The CHIEF JUDGE.—The 6 Geo. 4. c. 16. s. 22, if it stood alone, would not be sufficient to vest such a discretionary power in the solicitor to a fiat; but the clause in 1 & 2 Will. 4. c. 56. s. 58. says, if they shall receive anything "other than is allowed by this act, or any other such act as aforesaid, such person, *when duly convicted thereof*," &c.]

It would appear, that the 58th section of 1 & 2 Will. 4. c. 56. refers to the penalty of 500*l.*, but that the incapacity of the commissioner, which arises under the 6 Geo. 4. c. 16. s. 22, commences from the time he takes the improper fees. But, secondly, with respect to the travelling expenses, as Kidderminster was less than seven miles from the commissioner's residence, he was not entitled to any travelling fee at all, much less to a double fee; and in *Ex parte Harbin* (1), Lord Eldon said, that a barrister who would not attend without an additional expense, beyond the 1*l.* allowed by 5 Geo. 2. s. 42, should be considered as a barrister who could not attend; and, therefore, as not within Lord Rosslyn's order, requiring the insertion of the names of two barristers in a country commission: On this ground also, the solicitor was justified in not summoning the commissioner. *The King v. the Justices of Warwick* (2), where the Court of King's Bench decided, that a coroner who had taken three inquisitions in one day, was entitled only to the travelling fee of 9*d.* a mile, also establishes, that the commissioner has no right to the second travelling fee. They also referred to the case of *The Brighton Commissioners* (3).

The CHIEF JUDGE.—I suppose that the declaration of the Court, that the commissioner ought to have been summoned, and the costs of the petition, will satisfy the petitioner.—[*Mr. Bethell* assented.]—The

(1) 1 Rose, 58.

(2) 5 B. & C. 430; s. c. 8 D. & R. 117.

(3) Not reported.

solicitors were wrong in not summoning Mr. Scott as one of the quorum commissioners; but they attempt to justify their conduct. Now, the deponent, Mr. Daniel, does not deny that Mr. Scott is a barrister, or that he is one of the quorum commissioners appointed by the Lord Chancellor; nor does he allege that he had been ever unwilling to attend for the statutable fees, or that he ever offered them to him; but it is contended, that he was a person in the habit of taking improper fees, and, therefore, unable to act as a commissioner in any fiat. Giving credit to the solicitors for *bond fide* intentions, to act solely for the good of the estate, we are willing to make the order as lenient as possible, at the same time to mark our disapproval of the solicitors taking the law into their own hands. As regards the point of distance, there is, certainly, the affidavit states, only six miles six furlongs and thirty-three yards from Mr. Scott's residence to the town of Kidderminster; but it is not stated how far it was to the place where the meeting was held; they ought to have brought proof of that, if they had hoped to have made anything of that defence. The ground of my judgment, however, does not turn upon that point; but we think, that in the other respect the commissioner was wrong in taking the two fees for travelling expenses, where the meetings were both held at the same place on the same day. Although that is my opinion, the act does not enable the solicitor to sit in judgment upon the commissioner; indeed, it would be very improper if it did; but it appears to me, the words of the act only render him unable to act after the interposition of the Lord Chancellor, on hearing the case. In this case, Mr. Scott's name being in the commission, if the solicitor had seen anything to induce him to interfere, he ought to have applied to the Lord Chancellor, to have directed the fiat to other commissioners, stating his grounds, for without that, we are of opinion, that in all cases the solicitor is bound to summon the quorum commissioner. Then, as to the reason respecting the fiat and acts done under it being void, if the case of taking improper fees had been satisfactorily made out, we are also satisfied it never could have been the intention of the legislature to make all the acts of a

commissioner void, who might by mistake have taken an improper fee on some former occasion, as it would create the greatest confusion, if, after a considerable lapse of time, a case made out against a commissioner, were to have the effect of avoiding all his subsequent ministerial acts.

SIR J. CROSS.—The respondents never offered the commissioner his fees, so that they have not made good their defence on that point. Then they say he had not travelled seven miles; but nothing is shewn to convince us it was not more than seven miles to the place where the commissioners met. As to the taking of two fees, I do not think that question is judicially before the Court: on that point, therefore, I shall reserve my opinion; but at the same time I am of opinion, that if a commissioner, by mistake, should happen to take an improper fee, he is not liable until he is declared to be so by a Court of competent jurisdiction. But how do they treat this gentleman? He finds he is not summoned, and when he appeals to this Court for redress, he, for the first time, hears these solicitors are prepared to meet him with a charge of misconduct.

SIR G. ROSE.—It appears to me, that this gentleman ought to have been summoned, and the costs of this application must be borne by the solicitors, whose duty it was to have summoned him. It would be an exceedingly strong case, under any circumstances, to permit the solicitor to refuse to summon the person appointed by the Lord Chancellor, at the recommendation of the Judges. The case cited was one, where the solicitor, before a commission issued, had refused to insert the name of a barrister. It is clear that that case does not apply here.

The Court declares the commissioner ought to have been summoned, and must be summoned to all future meetings. Costs to be paid by the respondents.

1838. }
Jan. 22. }

Ex parte NALDER *re*
GRIFFITH.

Petition to supersede—Practice.

An allegation in a petition, stating, "that a fiat has been sued out, and obtained by A. B, in collusion with the bankrupt," is not

sufficient to let in proof of a concerted act of bankruptcy.

This was the petition of Thomas Nalder and John Sage, creditors of William Griffith, the bankrupt; and it stated, that when the bond given by the petitioning creditor to the Lord Chancellor, which ought to have had the word "prove" in it, was inspected, it appeared, that the word was written "froved," so as to render the bond nugatory; it also stated, that the said fiat so obtained and sued out by the said Matthew Phillips, had been obtained by him in collusion with the said William Griffith, the bankrupt; and it prayed a supersedeas, with costs, and permission to sue out another fiat, directed to a London commissioner.

Mr. Swanston and Mr. Keene, for the petitioners.—This fiat ought to be superseded, as the bond is not correct; and it is imperative on the person who takes out a fiat, to have all the documents correct. This is not a clerical error on the part of any officer of the Court.

Per Curiam.—This appears but a very trifling error; we suppose the petitioning creditor will give another bond, should the bankrupt not feel satisfied.

(The solicitor to the fiat undertook that another bond should be given if requisite.)

Mr. Swanston.—There is another objection to this fiat, on the ground of concert. It is true, if the commission had simply been concerted between the bankrupt and the petitioning creditor, it would not have been a sufficient ground for a supersedeas; but there is evidence here of a concerted act of bankruptcy, which must be fatal.

THE CHIEF JUDGE.—The first objection is certainly too slight to induce the Court to grant a supersedeas; if you had intended to bring the point of concerted bankruptcy before the Court, you should have presented a petition for that purpose.

SIR J. CROSS.—This appears to me a very vexatious petition. If the person petitioning insists on such precision and accuracy in all things, he ought at least to have had an allegation in his petition, charging the concerted act of bankruptcy.

SIR G. ROSE.—This petition must be

dismissed, with costs. The main point is a difference in the formation of the letter "p;" if this had been a mere clerical error, and there is nothing to induce the Court to think otherwise, it would have been a very hard case, and be a measure of very sharp practice to have superseded this fiat.

Petition dismissed, with costs.

1838. }
Jan. 26. } *Ex parte EVANS re EVANS.*

Practice.—*Removing a Fiat — Commissioners.*

Fiat moved from one list of country commissioners to another, under the circumstances.

Mr. Willcock applied to move a fiat to the Bristol commissioners. The petition stated, that the bankrupt resided at Bridge End, and that the majority of the creditors resided at Bristol; that the nearest list of commissioners to Bridge End was the Cardiff list, which met at a distance of more than thirty miles from the bankrupt's residence; and that it would be more convenient in every respect to hold the meetings at Bristol.

Per Curiam.—As the place where the commissioners meet is so far distant from the residence of the bankrupt, you may take an order, reserving permission to the assignees, when chosen, to apply to remove the fiat, should they think fit.

1838. }
Jan. 31. } *Ex parte BROADBENT re CROFTS.*

Assignee—Refusal of, to join in Action—Costs.

Where one of two assignees refuses to join in an action, or suffer his name to be used, the costs of the application to enable the other assignee to sue alone, will not be given against the assignee who refuses, unless the other had previously offered to indemnify him.

An order was made on this petition, on the 21st of March last, to empower one assignee to bring an action without joining the other, who refused his consent, on the ground of his being advised that the action was not tenable. The action had since been brought, and a large sum recovered to the estate. The case now came on as to the costs of the application.

Mr. Swanston, for the assignee who refused to join, submitted that, as he was advised that he could not sustain the action, before the other side could ask for costs, they ought to have shewn that they offered an indemnity.

Mr. Bacon, for the petitioner, insisted that he was entitled to the costs of this application, as the other assignee absolutely refused to allow his name to be used, and did not ask for an indemnity.

Per Curiam.—If you had offered him an indemnity, you might have had your costs against him.

The costs of all parties out of the estate.

1838. }
March 17. } *Ex parte ALLORY re ALLORY.*

Practice.—Country Commissioner—Refusal to review Certificate.

Where an order is obtained by the assignees to review a bankrupt's certificate, they are bound to prosecute the order, and not the bankrupt; and the power of the commissioners is not destroyed by having signed the certificate, and they are bound to review it when sent back to them by the Court.

This was the petition of the bankrupt, which stated, that he had conformed in all things, and obtained a sufficient number of signatures to his certificate; and that it had been signed and sealed by three of the commissioners, and lodged in the bankrupt office for allowance; but that, before the time required by law had expired, the two assignees presented a petition to stay the certificate, upon which the Court made an order, dated May 30, 1837, to the effect, that it should be re-

ferred back to the commissioners named in the fiat to review the certificate, reserving the costs to the hearing: that the petitioner was ready and willing that the most ample investigation should take place, and requested the assignees to convene a meeting for the purpose, but they wholly neglected to prosecute the order, although twice written to for the purpose: that the petitioner then applied to the commissioners, who appointed a meeting for the 13th of January 1838, when the assignees attended, but did not produce any witnesses, either to impeach the conduct of the petitioner, or to invalidate his accounts; but the petitioner was informed, that there was a difference of opinion among the commissioners as to their right or authority to interfere, and, at the petitioner's request, they gave him the following certificate:—

“To the Right Honourable the Chief Judge, and their Honours the other Judges, &c.

“In the matter of John Allory, a bankrupt. Whereas, by an order of the Court of Review, dated May 13, 1837, after reciting that, &c., assignees of the bankrupt's estate, did present their petition, praying that the allowance of the bankrupt's certificate might be stayed, or the certificate sent back to be reviewed,—It is ordered by the said Court, that it be referred back to the commissioners named in the fiat in the petition mentioned to have been awarded and issued against the said bankrupt, to review the said bankrupt's certificate of conformity. And whereas, in pursuance of the said order, we, the undersigned, being three of the commissioners named in and authorized by the said fiat against the said John Allory, and who had signed his said certificate of conformity, having met at the office of Messrs. Parker & Lowe, solicitors, situate in Cheny-street, in Birmingham, on the 13th day of January last, in pursuance of an application made to us for that purpose by the said Messrs. Parker & Lowe, and read over the said order and copies of the affidavits filed by and on behalf of the said petitioners, and of the said bankrupt respectively, in the said Court of Review: Now therefore these are to certify to the Court of Review

in Bankruptcy, that we, the said three commissioners, having met at the time and place above mentioned, in pursuance of such summons as aforesaid, and having taken into consideration the purport of the said order, and the several other papers and affidavits filed in the Court of Review, in the matter of the said petition then and there produced to us, did adjourn *sine die* all further proceedings under the said order, inasmuch as we did not comprehend the scope and intention of the said order, and inasmuch as we do not conceive we have power to alter a certificate already signed, delivered, and fully completed by us, and which has been removed to a superior court for confirmation under the provisions of the statute in such case made and provided. And we further humbly certify, that if it be intended by the said order that we should examine the deponents in those affidavits *vidé voce*, and such other persons as we may be informed can give important information on the subject, and certify such examinations, when so taken, to the Court of Review, with or without our opinion thereon, we shall be willing and ready to do so. Therefore, humbly requesting the direction of the Court," &c.

(Signed by the commissioners.)

The petition further stated, the petitioner had suffered by the delay in obtaining his certificate, and prayed that the certificate might be allowed.

Mr. Anderson, for the petitioner.—The consequences of the refusal to enter upon the inquiry have been very prejudicial to the bankrupt, as he has been prevented entering into business for want of his certificate, and has been sued for a number of small debts in the local courts, besides several large ones in the superior courts at Westminster. The certificate of the commissioners, although respectfully worded, is nothing short of a refusal to obey the order of the Court; and the petitioner ought not to be prejudiced by the doubts they entertain as to the extent of their jurisdiction. The Court will, it is hoped, therefore, order the allowance of the certificate to go, as of course, after the very improper delay which has occurred.

Mr. Keene, for the assignees, contended,

that the bankrupt ought to have prosecuted the order, and not the assignees.

The CHIEF JUDGE.—When this case came on for hearing, it appeared that a sum of money, received by an agent of the bankrupt's, had not been properly accounted for; and that the certificate had been signed by the commissioners on the supposition that certain accounts had been explained, to the satisfaction of the assignees. This afterwards turned out not to be the case; and we directed the commissioners to review their decision, inasmuch as it was on a matter of account, which they had greater facilities of looking into than this Court, and which they should have done in the first instance. The order will therefore be, to refer it back to the commissioners, to re-consider their certificate within a fortnight; or else the petition will be dismissed, with costs against the assignees.

SIR G. ROSE.—It appeared upon the former hearing, that the commissioners had delegated their duty to the assignees, having signed the certificate on condition that the bankrupt should, afterwards, render to the assignees an account that was required. It was quite impossible for this Court, therefore, to allow that certificate. It was consequently sent back, that the commissioners might look at the proceedings, and see whether they could properly certify that the bankrupt had, in all things, conformed. According to the present statement, no course of that kind has been taken, but they send back the certificate, and say, they cannot understand the order. It may be necessary to state to these gentlemen, that the necessity for reviewing the certificate arose, in the first instance, from their having delegated their authority to the assignees. The right order is, that the assignees shall prosecute the order within a fortnight, or the petition be dismissed, with costs. Should the commissioners refuse to proceed to execute the order, it will be time enough for the Court, upon application, to consider whether the case should not be laid before the Lord Chancellor.

Order accordingly.

Aug. 1; Nov. 14, } *Ex parte J. AND W.*
 1837. } *GUILLEBERT re TRYE*
 Mar. 5, 1838. } *AND LIGHTFOOT.*

Proof—Usury.

A. and B, bullion-merchants at Calais, employed C. and D, bullion-merchants in London, to act as their agents, to whom they were in the habit of transmitting bullion, money, and securities, giving them a discretionary power to invest at the most favourable time of the market. During their correspondence, C. and D. proposed to A. and B. to keep a debtor and creditor account, charging interest at 6l. per cent. upon any balance due to either house. C. and D. became bankrupt, owing a large balance:—Held, that the proof could not be allowed, on the ground that the transaction was usurious.

This was a petition to prove a debt under the following circumstances. The bankrupts were bullion-merchants and money-agents in London, and the petitioners were bullion-merchants, bankers, and foreign exchange agents at Calais, and had their agents in the different capitals of Europe, the bankrupts having been employed by the firm as their London agents since the year 1818. Their custom was, from time to time to transmit to their agents money, bullion, or bills of exchange, directing them as to the mode of investing the same, for which the agents received a commission upon both transactions; and as the money markets frequently varied very much in the interval between the period of writing and receiving the instructions by the agents, they were permitted to delay the selling or investing of the bullion or money until the state of the money market rendered it more advantageous. In 1819, the following letter was sent by the petitioners to the bankrupts, their London agents:

“Calais, 23rd April, 1819.

“Please send me a statement of my account, made up to the end of this month; and should be glad if you would add to it a mutual account of interest at 6l. per cent. per annum.

(Signed) Guillebert.”

To which the bankrupts answered—

“London, 4th May, 1819.

“With regard to the interest which you requested might be calculated upon the

account, at the rate of 6l. per cent., we have made a rough sketch of it in our accounts, but, as the balance merely amounted to a trifle in our favour, we do not, in the statement now sent, furnish the particulars. In future, it would be better if we kept a debtor and creditor interest account in the way you propose; and consequently, there will not be any occasion to discount your several remittances as they arrive.

(Signed) J. H. Trye,” &c.

In a subsequent letter sent to the bankrupts from Messrs. Guillebert, dated the 21st of May 1837, they stated, “We also agree to mutual account of interest at 6l. per cent. per annum.”

On the issuing of the fiat against the bankrupts, they were indebted to the petitioners in the sum of 3,628l. on actual remittances from them to the bankrupts since January 1837, a great part in bills which had not, at the time of being remitted, three months to run. A very small part of this balance was made up of interest at the rate of 6l. per cent., which the petitioners alleged was the legal interest in France. The commissioner had rejected their proof on the ground of usury.

Mr. Swanston, with whom was *Mr. Ellis*, for the petitioners.—There have been no less than forty-four settlements of the account between these parties since 1819, of which upwards of thirty have been in favour of the bankrupts. The last of these settlements appears to have taken place in December 1836. The defence intended to be set up on the other side is, that the plan of dealing was a loan from the French to the English house at usurious interest.

[The CHIEF JUDGE.—The proposal in the second letter refers more to the time of taking the account.]

Certainly; and it is contended, there was no loan of money in the contemplation of either party. The agreement for interest was only in contemplation of a balance in their dealings; there was no contract for the forbearance of any settlement or payment; and it is a strong fact, that thirty-three of the settlements were in favour of the bankrupts.

[The CHIEF JUDGE.—That would only affect the penalty.]

It goes to shew, that it was not a contract for a loan. Now, it is impossible to suppose that all these dealings were a mere

contrivance to enable the English house to lend to the French house, or the French house to lend to the English house, at the rate of 6*l.* per cent.

[The CHIEF JUDGE.—Have you the correspondence referring to the former dealings of the houses, which appears to be material in this case? It will be necessary for me to see all the correspondence before 1819, and the accounts, in order to see whether there was a contract for the forbearance of a debt.]

The next point is, whether the contract be a French or an English contract.

[The CHIEF JUDGE.—I suppose you are all agreed that there is nothing in the French law to prohibit the taking 6*l.* per cent.]

This contract is negotiated by letter; the first letter is not the contract, only the proposal: this the bankrupts did not comply with, and wrote a proposal to the French house, which the French house complied with. Now, directly the letter was signed in France, and put in a course of transmission, the contract was complete.

[The CHIEF JUDGE.—This would render it necessary for me to see the former contract.]

[Mr. Bethell stated he was quite content to take the facts, as stated on the petition.]

There is a case mentioned in 5 *Vin. Abr.* 527, (*Coleman v. Upcott*), that was for a performance by letter, where the Lord Keeper says, "If a man, being in company, makes offers of a bargain, and then writes them down, and signs them, and the other party takes them up, and prefers his bill, this shall be a good bargain."

[The CHIEF JUDGE.—That case only goes to shew, that when a contract is agreed to by all parties, it is completed.]

This case is mentioned by Lord Erskine in *Gaskarth v. Lord Lowther* (1): and the case of *Adams v. Linsell* (2) shews when a contract between two parties is completed.

[The CHIEF JUDGE.—The question here is, whether the contract is to be considered as of the place where it is completed, or of the place where it is to be performed.]

In *De la Vega v. Vianna* (3) it was held, that in a suit between parties resi-

dent in England, on a contract made between them in a foreign country, the contract was to be interpreted according to the foreign law.

[The CHIEF JUDGE.—This is laid down by Lord Mansfield in *Robinson v. Bland* (4); but this rule admits of an exception, where the parties, at the time of making the contract, had a view to a different kingdom.]

Suppose a contract were made in England, to pay interest in India at 6*l.* per cent., would that contract be void, because made in England? And yet it would appear so, from what was held in *Denar v. Span* (5).

[The CHIEF JUDGE.—There, the money was lent here, upon property lying in St. Kitt's.]

In the terms of the statute 14 Geo. 3. c. 79, all mortgages and securities executed here on bonds in the West Indies, are declared valid, although securing more than 5*l.* per cent. The case of *Harvey v. Archbold* (6) is in the petitioners' favour.

[The CHIEF JUDGE.—There is the point I called your attention to, for there the contract was made in England. But you do not contend, that if two Englishmen in France were to make a contract to pay more than 5*l.* per cent. interest in England, it would be valid?]

No, for that would be clearly an evasion of the statute; but here, there is nothing in the nature of a loan. In *Thompson v. Foldes* (7), where a revolted Spanish colony executed bonds at 6*l.* per cent., it was holden, they were not usurious, although in the hands of holders in this country, it not appearing that either the contract was made, or the amount to be paid, in this country. There is a case in 1 *Brod. & Bing.* 447, (*Wells v. Girling*), which is strongly in favour of the petitioners, where A. borrowed 80*l.*, with an undertaking to pay back 87*l.* in four separate instalments, with an agreement, that the whole 87*l.* should be payable on default of any one instalment, which would have been more than 5*l.* per cent.; but because it was not according to the substance of the contract that they intended to charge more than 5*l.*

(1) 12 Ves. 114.

(2) 1 B. & Ald. 681.

(3) 1 B. & Ad. 234; s. c. 8 Law J. Rep. K.B. 388.

(4) 1 Sir W. Bl. 258.

(5) 3 Term Rep. 425.

(6) 3 Barn. & Cress. 626.

(7) 2 Sim. 194.

per cent., the Court of Common Pleas held the agreement not usurious.

[The CHIEF JUDGE.—There, it was held only in the nature of a penalty; and if the instalments had been paid, no more than 5*l.* per cent. would have been received.]

Beete v. Bidgood (8) was the case of the sale of an estate for 15,000*l.*, and if not paid by instalments on certain given days, the vendee was to pay 6*l.* per cent. interest. Promissory notes were given for these sums, compounded of the instalments and interest; it was held, that the whole must be considered as the purchase-money of the estate, and therefore the agreement was not usurious. It is also clear, that in order to bring any case within the operation of the statute of Anne, there must be a contract for forbearance of money lent; and here was no agreement to forbear. The French house might have called in its balance at any time. In the case of *Floyer v. Edwards* (9), there was a sale of goods at three months' credit, and a stipulation with the purchaser, in case the money were not paid, he should be allowed a halfpenny an ounce per month until it was paid. This was far above the rate of legal interest; but as it was proved that this was a custom in that particular branch of trade, and that it was a *bona fide* sale, it was held not usurious. In that case, Lord Mansfield says, "The view of the parties must be ascertained, to satisfy the Court that there is a loan and borrowing, and that the substance was to borrow on the one part, and lend on the other; and where the real truth is a loan of money, the wit of man cannot find a shift to take it out of the statute." Granting, for argument, that there is a contract for a casual balance, which may be questionable, here the debt is not founded upon the contract; there is no possibility of pointing out any part of the debt as based upon the contract. What pretence, then, can there be for excluding these petitioners from a proof for their advances? This, then, is a valid contract; even if not, the debt was not founded on it. Therefore, the Court is bound to overrule the judgment of the commissioner.

Mr. Bethell and *Mr. L. Wigram*, contra.—It is perfectly clear that the judgment

(8) 7 B. & C. 453; s. c. 6 Law J. Rep. K. B. 35.

(9) Cowp. 112.

of the commissioner is right, and that the present case is directly within the meaning of the statute. This is a contract by which money or goods belonging to another person until demanded, are to pay interest at an usurious rate. This is expressly within the words of the usury laws; it is directly within the meaning of the word "loan," and within the meaning of the word "forbearance." It is not essential to have a time fixed for the payment of the money; it would be equally usurious if the forbearance were for an indefinite period. *Harvey v. Archbold* appears in every way to meet this case. The other cases cited in support of the argument, do not apply. In *Floyer v. Edwards*, there was no advance or loan of money; but, in this case, the bankrupts were permitted to retain the funds in their hands, and speculate upon the rise of the money-market, for which they paid interest. What was that but a loan or forbearance of money lent? And the contract was English. It was made in England, the payment was to have been made in England, and the interest ought to have been after the legal rate of interest in England, otherwise it is usurious. If the contract had been to be performed in France, it must have been held to be a French contract. But the case of *Harvey v. Archbold*, which has been cited, determines this question. There, the place of performance was Gibraltar, the case was therefore the converse of this. Dr. Story, in his work *On the Conflict of Laws*, p. 235 says, "One of the most simple cases is, where two merchants doing business with each other, reside in different countries, and have mutual accounts of debt and credit with each other, for advances and sales. What rule is to be followed? Is it the law of one country or of the other, where there is a conflict of laws? If the transactions are all on one side, as in case of sales and advances by a commission merchant in his own country, for his principal abroad, there the contract may well be referred to the country of the commission merchant, and the balance deemed due according to its laws; for although it may be truly said that the debt is due from the principal, and he is generally expected to pay it where he dwells; yet it is equally true that the debt is due where the advances

are made, and payment may be insisted on there." These are advances made in England, where the debt arises, and payment is to be performed. Dr. Story, in p. 247, says, "And if the place of performance is different from that of the contract, the interest will be according to that of the former." Here, the advance was in England, by the reception of the money, and the interest ought to have been the legal rate of interest in this country. The moment the goods or securities were converted into money, the debt arose, and not before.

Mr. Swanston, in reply.—The position that the validity of the contract depends upon the law of the place where the contract is concluded, has not been displaced. In the case of *Eakins v. the East India Company* (10), interest was allowed for the value of a ship and cargo taken in the East Indies, after the rate of interest in India. Dr. Story, in the work so frequently referred to, in page 248, states a case in favour of the petitioners: "A note was given in New Orleans, payable in New York, for a large sum, bearing interest at 10l. per cent., the legal interest of Louisiana, that of New York being 7l. per cent., the question was, whether the note was tainted with usury. The Supreme Court of Louisiana decided that it was not usurious; that interest might be stipulated for, according to the rate either of Louisiana or of New York." In the present case, according to this rule, interest may be charged either according to the French or English law. But it has not been established in this case, that the contract was to have been performed in England; on the contrary, the only thing to be done in England, was striking the balance of the account. But supposing the whole transaction had taken place in England, still there must have been a loan of money to bring the case within the statute of Anne, the words of which are, "take directly or indirectly for loan of any money, wares, merchandise," &c. Now, there is no pretence for saying there was any loan contemplated in this case.

The CHIEF JUDGE.—In this case, the whole question appears to be, whether this

can be considered a loan of money from the period the proceeds were received by the English house; and if so, the giving of 6l. per cent. for the forbearance of the loan may be considered an English transaction. My present impression is, that this was a contract for the loan of money in this country; but, as this is a case of so much importance, I shall consult my colleagues before I deliver my judgment.

November 14, 1837.—This case was brought on again for argument before the three Judges, and the arguments recapitulated; when, at the suggestion of the Court, an issue was agreed upon, as to whether the agreement to pay 6l. per cent. interest, was founded on a contract for a loan of money; or whether it was the result of the general agency contract between the parties.

SIR JOHN CROSS.—I am at a loss to discover what fact is in dispute, to render the intervention of a jury necessary for the guidance of the Court.

The declaration stated the amount of the debt claimed, and the usual fiction of a wager of 10l., and that such debt was proveable under the fiat. Plea—That although such fiat was issued, there was no debt proveable under the fiat, and a further plea, alleged the usurious contract. Replication, that the contract was not usurious, but made and entered into for good and legal considerations, putting the fact of usury in issue.

The case came on for trial March 5th, before the Chief Judge, and a special jury.

Mr. Swanston, for the petitioner.

Mr. Bethell, for the defendants.

His Honour the CHIEF JUDGE, in his address to the jury, observed—The reason why the Court suggested an issue was, that before the establishment of this Court, the Lord Chancellor would have directed an action at law to try the fact, whether the contract had been tainted with usury. But since the establishment of this Court, with full power to try an issue, the Court did not like to conclude the plaintiffs, without giving them the benefit of a jury, if they thought fit; and the jury are now trying this case, as in an action, putting the

(10) 1 P. Wms. 306.

bankruptcy out of the question. The substantial question is, whether, by means of this contract, the plaintiffs have deprived themselves of a remedy to recover the amount in the country, where the contract was made. The question before the Court was, whether this was a French or an English contract. The foundation of the contract was laid on the French letter, and therefore made in France; but it is not always the place where the contract was signed, that determines this; but there is another question, what was the intention? Your opinion will be asked, as to the place where it was the intention of the parties, that the contract should be performed. If you are of opinion that it was the intention of the parties that the contract should be performed in England, then it would be an English contract, and bound by English law. Now, it was clearly the intention of the parties, that the money should be received in England, the accounts settled there, and interest paid there on the amount of the balances. Then the objection as to the recovery of this money, is the charge of usury. What we have to look at is, the contract, not the consequences of it. The question to be left to you is, the substance, not the form of the issue, you will therefore inquire what was the substantial arrangement between the parties; that is the question for the jury. This claim is for monies received by the bankrupt since 1819, and you will have to look to the prior dealings; and if usury is established, the principal is lost as well as the interest. Then as to the customary dealing, there is nothing in evidence to shew this; but if you should say you think this additional 1*l*. per cent., was for extra trouble, it may be taken into consideration. The questions for your consideration are, first, whether the contract was to be performed in England. Secondly, whether Messrs. Guillebert were to have received more than 5*l*. per cent. for interest; if so, your verdict must be for the defendants; but if the additional 1*l*. per cent. was not in respect of interest, but for some other claim, then your verdict must be for the plaintiffs.

Verdict for the defendants; but the jury expressed their opinion, that it was a very hard case.

1838. } *Ex parte BROWN re WARWICK*
Jan. 23. } AND OTHERS.

Bills—Specific Appropriation.

J, R, & Co. of America, according to previous agreement, purchased shares of the United States Bank, on the joint account of themselves and W. & Co., the English house, and transmitted the certificates of the shares to W. & Co., in order to their sale in England, J, R, & Co. advancing the purchase money, and drawing bills to that amount on the English house. The bills were negotiated by J, R, & Co., in America, who advised the English house that they had drawn such bills against the shares. The certificates, arriving after the bankruptcy of the English house, came into the hands of the official assignee, and shortly afterwards J, R, & Co. stopped payment. On the petition of the bill-holders, it was held, that the American estate had a right to insist, that these bills should be paid out of the proceeds of the shares, and that such proceeds, pro rata, should be applied in payment of all the bills so drawn against them.

The fiat issued on the 12th of May 1837, against Warwick and Clagget, carrying on business as merchants, in London. The petition stated, that previous to February 1837, Jackson, Riddle & Co., of Philadelphia, United States, and the bankrupts, agreed to purchase on their joint account and risk, divers shares in the bank of the United States. The purchase was to be made by Jackson, Riddle & Co., and the money to be raised by means of bills of exchange, to be drawn in America by Jackson, Riddle & Co., on and to be accepted by the bankrupts, and to be negotiated by Jackson, Riddle & Co. in America, and the produce applied in payment of the money to be advanced by them in the purchase of the said shares. On the 25th of February 1837, pursuant to such agreement, Jackson, Riddle & Co. purchased 350 shares of the United States Bank, and remitted the certificates for the same to the bankrupts, in order that they might be sold, and the produce applied in payment of the said bills of exchange, which certificates came into and still continue in the possession of the official assignee. The purchase-money of the shares amounted to

9,374*l.* 16*s.* sterling, and nine bills of exchange, to cover that amount, were drawn upon the bankrupts, and negotiated by Jackson, Riddle & Co. in America. On the 28th of February 1837, a letter was written and sent by Jackson, Riddle & Co. to the bankrupts, of which the following is an extract:—

“We purchased on the 25th inst., for our joint account, 350 shares, United States Bank, at 118*½*, which we will remit and draw for per next packet. We should have drawn *against the same* this day, but expect that bills will command a better price for the 8th packet. The certificates could not be got ready for transmission by this opportunity.”

Another letter, dated the 7th of March 1837, was written and sent by Jackson, Riddle & Co. to the bankrupts, as follows:

“Enclosed we hand seven certificates, favour your William Sidney Warwick, each for fifty shares, United States Bank stock, Nos. 4,027 to 4,033 both inclusive, being the 350 shares purchased the 25th ult., for joint account with your good selves. Against the purchase of 350 bank shares, we have drawn our bills, No. 147 to 150, amounting to 3,100*l.*, the residue we will value for by next packet.”

On the 9th of March next, a letter was sent by and to the same parties, as follows:

“We have drawn to-day on you, at sixty days, 979*l.* 10*s.* 7*d.*, as per statement annexed, against your bank shares, remitted in our last respects, which account has credit for same, at 9*½*, H 4,745. 27 cash. We could not fill up the account to-day, but hope to close the 350 shares to a point for the 16th packet.”

On the 15th of March, a letter was sent by and to the same parties, of which the following is an extract:—

“Prefixed we hand statement of the bank shares remitted 7th instant, closed by our bill of the 11th instant, at sixty days, 4,535*l.* 2*s.* sterling, which we trust will prove correct and satisfactory.”

The bill in the above letter mentioned closed the account between the two houses, for the purchase of the 350 shares.

In consequence of the bankruptcy of the London house, the bills so drawn were dishonoured, and were still unpaid. Subsequently to their negotiation of the bills,

and the transmission of the certificates for the said shares to the bankrupts, Jackson, Riddle & Co. stopped payment, and became insolvent. At the time of the issuing of the fiat, the petitioners were the holders of two of the said bills—viz. one for 500*l.*, and another for 4,535*l.* 2*s.*, the consideration given being money to the full amount, less the discount.

Besides the 350 shares, United States Bank stock, Jackson, Riddle & Co. had previously purchased on the joint account of themselves and the bankrupts, 200 other shares of the United States Bank, and drawn bills on the bankrupts against the same. 150 of these shares had been sold by the bankrupts, and the greater part of the proceeds applied by them in discharge of some of the bills so drawn against them, except a balance of 79*l.* 15*s.* 9*d.*, which was now in the hands of the official assignee, together with the remaining fifty shares. Only one of the last-mentioned bills was outstanding, amounting to 1,249*l.* 2*s.* 2*d.*, of which the petitioners were the holders. The certificates were made out in the name of Warwick alone.

This was the petition of W. Brown and others, partners, on behalf of themselves and other holders of the bills so drawn upon the said bankrupts against the United States Bank shares mentioned; and it prayed, that the official assignee might be directed to deliver to the petitioners, the first-mentioned shares, in order that they might apply the proceeds in payment of the costs of this application, and then in full satisfaction of the bills drawn against the same, in proportion to the amount of the several bills, or that the official assignee might be ordered to sell the said shares and apply the proceeds in payment of the said costs, and then in payment of the said bills, in proportion to their respective amounts. A similar order was prayed as to the fifty remaining shares, and the balance of 79*l.* 15*s.* 9*d.*, as regarded the outstanding bill of 1,249*l.* 2*s.* 2*d.*

Mr. J. Russell, for the petition.—The petitioners are holders of these bills by intermediate indorsement.

[SIR G. ROSE.—How do you make out your lien upon these shares?]

The shares have come into possession of the assignees. Jackson, Riddle & Co. are

entitled to have the certificates given up to them, to answer the bills drawn against them—*Ex parte Hobhouse re Mundy* (1).

[The CHIEF JUDGE.—Was there any express contract to appropriate these shares to the payment of the bills?]

The correspondence shews that upon the face of it: the bills are there expressed to be drawn against the shares. The bankrupts were bound to take up the bills with the proceeds. Can, then, the assignees be entitled to deal with them as part of the general estate of bankrupt, even though the indorsees had no notice?—*Ex parte Prescott* (2).

[SIR J. CROSS.—Does it appear that the shares were sent to England for the purpose of sale?]

They were, and were made out in the name of Warwick alone, for the convenience of sale.

[The CHIEF JUDGE.—Your correspondence only shews, that they were sent by Jackson, Riddle & Co. for that purpose, not that the bankrupts assented.]

[SIR G. ROSE.—Could the chattels of a partnership remaining in the hands of a partner be applied to a particular class of creditors?]

[SIR J. CROSS.—It seems rather to have been a joint purchase, making the two houses joint owners, though one paid for the whole. The part-owner, then, who paid for the whole, would have a lien.]

Suppose A. and B. purchase cotton upon their joint account, and before the cotton is paid for, A. becomes bankrupt; it is clear, that the assignees could claim no part till the price was paid, and then the profit or loss must be shared. The bills, here, constitute the price of the shares, of which the assignees have not paid one shilling. The bill-holders are entitled to the proceeds of these shares, as in *Ex parte Waring* (3).

[SIR G. ROSE.—This case is not properly put, as the case of bankers who have left bills in the hands of their correspondents. The way in which you are entitled to work out your right, is by the equity which the assignees of the two estates have

against each other. The assignees of the estate in America have a right to say, that the assignees of the bankrupt shall not touch this joint fund till they relieve the American estate of these bills. There must be an order to keep distinct accounts in the common way of working partnership accounts.]

Mr. Burge appeared for the American house, who were willing that the proceeds of the shares should be applied in discharge of the bills, provided they were indemnified for their expenses, and the bill-holders consented to forego all proof against either estate.

Mr. Swanston, for the assignee, objected to any order of the kind. They claimed upon *Ex parte Waring*.

[The CHIEF JUDGE.—No; upon *Ex parte Prescott*.]

No previous case went the length of *Ex parte Prescott*; that is, to establish the right of one partner to be paid out of the estate, to the exclusion of the other partners.

[SIR G. ROSE.—Whether one partner could, as against their own creditors, give a lien, is questionable; but they could as against themselves.]

The goods are partnership goods, and between the partners themselves there is a debt; but no lien in favour of the bill-holders or the partners drawing the bills. If there is no partnership, the petitioners are out of court. In *Ex parte Waring*, there was an express contract that they should draw against the fund; but, here, they seek to supply the defect of a written contract by parol evidence, there being no terms in the contract, that the American house should be paid out of the fund. It is also the subject of reputed ownership, as having come into the hands of the assignees. No one had any intimation besides Warwick, that others were interested; therefore, it is within the case of *Ex parte Chuck* (4), where it was held, that property so circumstanced passed as the property of the apparent partner. The property came over in Warwick's name alone, with nothing to intimate a secret trust in favour of the American house and Clagget, which brings it within *Ex parte Watkins* (5), where it was decided, that not even an express

(1) 3 Mont. & Ayr. 269; s. c. 6 Law J. Rep. (N.S.) Bankr. 76.

(2) 1 Mont. & Ayr. 316; s. c. 4 D. & Ch. 23.

(3) 2 Rose, 182; s. c. 19 Ves. 330.

(4) 1 Mont. 615.

(5) 2 Mont. & Ayr. 349.

declaration of trust would prevent the 76th section of the Bankrupt Act from operating.

The CHIEF JUDGE.—It appears that the petitioners are entitled to the order they seek, and the manner in which they apply to have the proceeds of the shares transferred, appears most beneficial for all parties, if they establish their right to have the bills paid out of the proceeds; and it appears that they have that right. The way in which we must look at the case, is by referring to the letter which is set out, and which Mr. Swanston says, is the only evidence, but which evidently presupposes a contract in existence; because it begins, "We purchased on the 25th instant, for our joint account, 350 shares, United States Bank, which we will remit and draw for by the next packet." That letter is not the commencement of a contract, but there is a previous arrangement. When we look back to the petition, it is there stated, that it was arranged, that the house in America should purchase, upon the joint account, shares of the United States Bank, which they were to remit to London, and the two houses were to share the profit or loss, as the case might be. It appears to me immaterial, whether, strictly speaking, it was a partnership or not, this being a specific agreement to share the profit or loss. If there was that specific agreement, they were partners so far. What is the effect of the contract? There was a stipulation by the English house, that upon the transmission of the shares, they would hold them as the joint property of the two firms, subject to the payment of the bills, and then to share the surplus between them. The American house have a right to insist upon this application of the proceeds. The bill-holders come not upon a supposed lien, but to have their bills paid; and the American house have a right to insist that they should be paid out of the produce of the shares. It seems to me, that in this case, following the cases of *Ex parte Copeland* (6), and *Ex parte Prescott*, the proceeds of the shares ought to be applied, first, to the payment of the bill-holder. Though there do not appear to be any

(6) 3 Des. & Ch. 199; s. c. 3 Law J. Rep. (N.S.) Bankr. 7.

other creditors of the two houses, yet their rights must be provided for, as in the order made in the cases cited. But it is said, that the assignees are entitled to hold these shares, because they were in the order and disposition of the bankrupt at the time of the bankruptcy, under the 72nd section of the Bankrupt Act. It does not appear, that that section applies to this case. The property was transmitted to the English house for the benefit of the two firms; and, therefore, came clothed with a trust, and cannot be subject to that clause in the statute, by the authority of *Ex parte Watkins*. That case was peculiar, for there shares in an insurance office were purchased in the name of the bankrupt as a secret trust, and for the purpose of concealment, and the Lords Commissioners, in giving judgment, laid great stress upon that circumstance, and confined their opinion to the case of a single secret trust, not as in this case, where it is the property of many, purchased for the benefit of the two houses, but made out in the name of Warwick, for the convenience of sale.

SIR J. CROSS.—I have no difficulty in coinciding with the opinion expressed by my learned colleague, as the American house, who are undoubtedly entitled to this property as between them and the London house, consent to its being applied as prayed in the petition. I consider that there is no question of order and disposition.

SIR G. ROSE.—The question of order and disposition comes with no good grace from the assignees. They, with the proceedings in their hands, ought to have put the fact in a course of evidence, by shewing the act of bankruptcy. There is no evidence as to that essential circumstance. Moreover, it is stated, that long before the bankruptcy, there was a suspension of payment by Warwick, and an inspector appointed; therefore, the property was not in the possession of Warwick. It must be the common order for keeping distinct accounts, in order to let in any claim against the joint fund; and it must be declared, that the fund is a fund *pro rata* for the payment of all the bill-holders similarly circumstanced, and all expenses must be provided for.

Costs of all parties out of the fund.

1838. } *Ex parte* AINSWORTH AND
Jan. 29. } OTHERS *re* PETER WALKER.

Equitable Mortgage—Fraudulent Preference—Petition.

Where the petition of an equitable mortgagee states that the deposit took place only nine days before the issuing of the fiat, and there is nothing to rebut the presumption of fraudulent preference, the Court will not make the usual order.

Semble, the allegations in a petition are more in the nature of information to the Court than as pleadings in a cause.

This was the petition of an equitable mortgagee. The petition stated, that the petitioner and two others carried on business as commission-agents, under the name of Brierley & Co., and had many dealings with the bankrupt, who was a cotton-spinner, and had a mill situated at Hurdley, in the county of Lancaster, up to the dissolution of partnership between the petitioner and his co-partners, which occurred on the 11th of April 1837, in consequence of the embarrassed state of the affairs of Brierley & Co., and the petitioner finding a balance of 5,748*l.* due to the firm from the bankrupt, pressed him for some security for the amount, which the bankrupt gave on the 18th of April 1837, by depositing in the petitioner's hands the title-deeds to the cotton-mill, at the same time signing a memorandum to the effect that the deeds were deposited as a security for any sum or sums of money now due or hereafter to become due from him, either alone or with any late, present, or future partner or partners, not exceeding 5,000*l.*, &c.; and that a fiat in bankruptcy was awarded against the bankrupt on the 27th of April 1837. The prayer was, that the petitioner might be declared equitable mortgagee to the amount, and for an account to be taken by the commissioners.

The affidavit of the bankrupt was filed, and read by *Mr. Spence*, the petitioner's counsel. It stated the dealings between the parties for a long time, and that he became indebted to the partnership in a considerable sum; that, in consequence of some communication he had had with Brierley & Co., he went to Preston, and

saw the petitioner on the 15th of April 1837, who requested him to give the firm of Brierley & Co. what assistance he could in the way of security, in order that they might deposit some with their bankers; and that he would let the petitioner have his title-deeds to the mill, &c.; that he observed he had not brought his deeds with him, but that he was willing to assist the firm of Brierley & Co. as far as he could, and promised to sign any acknowledgment of the debt for the bankers' satisfaction; that he offered to go over to Brierley & Co.'s warehouse on the following Tuesday with his title-deeds; that the bankrupt then inquired, whether, as notice of the dissolution of partnership between Thomas Ainsworth and Brierley & Co. had appeared in the *Gazette*, the business would be carried on as usual, to which the petitioner replied, that depended upon how far they should be able to induce their bankers to put off payment for a sufficient time, but that he should be assisted to go on at all events in his trade as usual; that while they were on their way to the office of the petitioner's solicitor they were met by two of the petitioner's sons, partners in the firm of Brierley & Co., who suggested the propriety of going to the dwelling-house of the petitioner, as it was a very busy day (being market day) at the attorney's office; that he was shewn into a room by Thomas Ainsworth, jun., and his brother William Ainsworth, in the absence of the petitioner, when William Ainsworth placed upon the table a paper, which the bankrupt afterwards discovered to be a cognovit in an action of debt for 8,000*l.*, at the suit of the petitioner and his partners, which he was requested to sign, and replied, "I will sign anything you require; I am entirely in your hands; only I hope you will carry on the mill as usual;" that William Ainsworth said, "I will do all in my power to prevent the mill stopping," but that if the bankers would not retire the acceptances which defendant had given, then that would be impossible; that defendant thereupon immediately signed the paper without reading it, supposing it to be an acknowledgment of the debt to accompany the title-deeds, and his signature was attested by Elizabeth Ainsworth,

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a daughter of the petitioner; that no mention was made by any one at the time that it was a cognovit, or of any writ or action at law having been commenced against him, nor had he any knowledge or suspicion thereof until an execution was levied, as hereinafter mentioned, but that since the putting in force of the said execution, defendant has been informed that a writ of summons, in the Court of Common Pleas at Lancaster, had, on or about the 10th of April last, been sued out by the petitioner and his partners against the defendant, which the defendant never knew of until the 22nd of April, when the execution was levied; that on the 18th of April last, the bankrupt went over with his title-deeds to Manchester, and delivered them to the petitioner Thomas Ainsworth, at the warehouse of Brierley & Co.; and, at the request of the petitioner, he called again a short time afterwards, on which occasion he found together the petitioner, William Ainsworth, and Mr. Catterall, their attorney, the latter of whom perused the title-deeds, and prepared a further paper, which he signed, under the impression that it also was to go along with the deeds to the bankers of Brierley & Co., and which paper is now alleged to be the medium of deposit, &c.; that William Ainsworth fixed, at that meeting, that deponent should go over to Preston on the Thursday following, the 20th of April, to arrange about their supplying him with cotton, and money for wages, as the firm of Brierley & Co. had previously done in Manchester; that he went, and there saw Thomas Ainsworth the younger, and William Ainsworth, who told him that the petitioner had not returned home; that they were glad to inform him that things were turning up better at Manchester; and that in their father's absence they would give him a recommendation to Mr. Cooper, commission-agent in Preston, and gave him a letter of introduction accordingly, and deponent, on delivering the letter, received from Mr. Cooper 120*l.* to pay his workmen; that on the 22nd of April, the Saturday following, he was visited by a sheriff's officer and the solicitor Mr. Catterall, who informed him that they had an execution against his goods for 8,000*l.*;

that application had been made to the Judges of the Court of Common Pleas at Lancaster, and the execution was set aside.

Mr. Spence and Mr. Anderdon, in support of the petition.

[*Per Curiam*.—Are you ready to abide by the order of the Court, and have the securities sold, and the money brought into court to abide our decision?]

Mr. Spence assented.

[*Sir G. Rose*.—Your petition states, that the deposit took place on the 18th of April, and that the fiat issued only nine days afterwards; can this Court give effect to your lien under such circumstances?]

There is no pretence for saying that this was a fraudulent preference, neither do they, on the other side, allege any circumstances that could have led to the supposition that such an issue would be raised. It is apprehended, that this Court is bound to see the pleadings of the cause strictly adhered to, and not to permit the parties to be taken by surprise. The only issue they have raised is, as to an alleged agreement on the part of the petitioner to support the bankrupt in his business.

Mr. Swanston and Mr. Deacon, for the respondents, were not called on by the Court.

[*Per Curiam*.—If it had been the practice in this court to treat the affidavits made by parties in the strict nature of pleadings in a cause, it would have been the duty of this, as it is of other courts, to keep the parties to their allegations in their petitions; but such has not been the practice in bankruptcy. The affidavits tender no issue, they can only be looked upon as the statements of parties on oath, for the information of the Court; the Court has always exercised a discretion to say what issue lies upon the petitioner from his statements in the petition; and when we see the deposit took place on the 18th of April, and the bankruptcy on the 27th, the Court cannot declare the petitioner entitled to a sale of the securities, unless for the purpose of paying the money into court. The order we propose to make does not give the assignees any more right to have the deeds than they had before. All the Court can order upon this state of facts is,

that the petition shall be dismissed, with costs, unless the petitioner consent to an order for the sale of the property, and payment of the proceeds into court, with liberty to the assignees to present a petition to have the proceeds paid over to them.

1838. } *Ex parte* BIGNOLD *re* THEO-
March 14. } BALD.

Mortgage, with Power of Sale—Notice—Reputed Ownership.

The common order for sale made on a mortgage, with power of sale, notwithstanding a proviso that it should not be exercised, for five years, and the mortgagor had become bankrupt within the five years.

Quære—Where the same person is secretary of two societies, whether knowledge obtained by him in his capacity as secretary to one society, amounts to notice to the other society of a deposit of shares, so as to take the case out of reputed ownership.

The bankrupt had mortgaged real estates to the petitioner, with a power of sale; but it was provided, that the petitioner should not exercise this power for five years, which had not expired at the time of the bankruptcy.

By an agreement dated August 1835, between the bankrupt of the one part, and Samuel Bignold, the petitioner, as secretary of the Norwich Union Life Insurance Company, of the other part, it was agreed and declared by the bankrupt, that the certificates of twelve shares of the Norwich Union Fire Insurance Society, the property of the bankrupt, and which he had deposited with the said S. Bignold, should remain with him, by way of pledge, as an additional security for 8,000*l.* and interest, secured by a mortgage of real estates, and that the bankrupt would at any time thereafter assign or transfer the shares to S. Bignold. The petition stated, that S. Bignold was, at the date of the agreement, and continued to be, one of the secretaries of the Norwich Union Fire Insurance Society; and consequently, that society, through him, had immediate notice of the deposit, so as to take the shares out of the reputed ownership of the bankrupt.

On the 9th of November 1837, a fiat issued against the bankrupt. The affidavit of Thomas Bignold stated, that he and his partner, Mr. Pulley, were joint solicitors of the Norwich Fire Insurance Society, and that the transfers of, and deeds relating to, shares in the last-mentioned society, were prepared at the office of him and his partners: that in respect of each share in the said society a certificate was granted to the original proprietor; and when any change of ownership took place, the certificate was brought to such office with instructions, and the deed was there prepared, and sent with the certificate to be laid before a board of directors, for their approval of the proposed new proprietor; and if approved, to have a memorandum written on the certificate, of the deed executed by such new proprietor, signed by three of the directors; and that such deed was retained at the office, and the certificates returned to the solicitors' office, to be delivered to the persons entitled thereto: that the certificate was the only document which a proprietor of shares held as evidence of his title: that the twelve certificates of the said bankrupt's shares, from the time of the deposit with the Norwich Union Life Insurance Society, had been in the possession of Mr. Pulley's firm, as solicitors of the same society; and that no sale or transfer of them could have been effected by the bankrupt without the possession of the certificates, and the knowledge of Thomas Bignold, or some member of his firm. The affidavit of Adam Taylor stated, that he and Samuel Bignold were joint secretaries of the Fire Insurance Society, and that the shares continued, to the bankruptcy, to be in the books of the society in the name of the bankrupt, and that the annual dividends were regularly paid to the bankrupt; and that no notice was ever given to him of any incumbrance thereon by Samuel Bignold; and that the Life Insurance Society was wholly distinct from the Fire Insurance Society.

This was the petition of Samuel Bignold, as secretary of the Norwich Union Life Insurance Society; and it prayed, that he might be declared equitable mortgagee of the real property, and of the shares so deposited, and for a sale.

Mr. Swanston and Mr. O. Anderdon for the petition.

Mr. Cooke, contra.—The period for calling in the mortgage is not yet expired, and consequently, there can be no sale ordered of the real property. As to the shares, there has been no notice to take the case out of reputed ownership, under the 72nd section of the Bankrupt Act; there was only the knowledge of Bignold, as agent of the Life Insurance Office; there ought to have been some official notice to the Fire Insurance Office: the bankrupt also regularly received the annual dividends.

Mr. Swanston, in reply.—The shares could not be transferred without the production of the certificates. In *Smith v. Smith* (1), all the notice that was given was, that one of the trustees had some private conversation relative to the transaction.

[The CHIEF JUDGE.—In *Kidder's case* (2), the Lords Commissioners thought the receiving of the dividends a material circumstance.]

The equitable contract was complete, and the only question is, whether it can be carried into effect against the assignees.

[SIR J. CROSS.—It is most probable, that the secretary is the proper person to whom notice should be given.]

Notice to any person officially concerned is all that is necessary.

[The CHIEF JUDGE.—Official notice is sufficient.]

Bignold was a trustee for both parties at once.

The CHIEF JUDGE.—There are two questions raised—first, in respect of the legal mortgage of the real property; secondly, in respect of the deposit of the shares of the Norwich Union Fire Office. The objection to the prayer of the petition as to the real estate, rests upon two covenants in the deed, by one of which the mortgagee covenants not to call in the mortgage till the expiration of five years, if the mortgagor should continue to pay

the interest regularly; and the other, a covenant for quiet enjoyment. It is said by the assignees, that in consequence of these covenants, the mortgagee could not put in force the power of sale contained in the deed, and that, therefore, he cannot now call upon the assignees to sell. It is true, that he could not do it in respect of the power of sale; but as a debtor, he desires to prove his debt against the estate: this he cannot do till he has realized his security. It is the ordinary mode, after the assignees are chosen, to sell the security. That sale indicates the value of the property; the party gets paid *pro tanto*, and proves for the difference. The assignees rest upon these covenants, as keeping the petitioner out of the proceeds, and yet are not willing to give him the benefit he is entitled to from them. Before the bankruptcy, the petitioner had the responsibility of the bankrupt, and of his estate; but he loses the bankrupt's responsibility, by the bankrupt's getting his certificate, yet the assignees wish to keep him to all the contracts he has made. The object of the petitioner is, to produce the best evidence of the value of the property—namely, by a sale of it. There seems to me no objection to granting that part of the prayer of the petition. There is some difficulty as to the other part, on account of *Kidder's case*. What has been done, can hardly be considered as notice to the Fire Office. The cases upon this subject put the necessity for notice on two grounds—first, upon the incompleteness of the equitable transfer without it, inasmuch as, by the transfer of goods, the complete right passes; but not in this kind of property; and therefore, without notice, the title is not complete. Secondly, that without notice, it is not out of the order and disposition of the bankrupt. In the case of shares, that inasmuch as the bankrupt's name was upon the books as owner, he must be apparent owner, and that he might get credit on the faith of that, and might have had these shares transferred to other parties, which the directors, not having notice of the equitable deposit, might innocently be parties to. All the cases having required notice to the office of the deposit, to prevent the right of the assignees attaching, the question is, whether notice has

(1) 2 Cr. & Mee. 231; s. c. as *Smith v. Masterman*, 2 Law J. Rep. (N.S.) Exch. 42.

(2) 2 Mont. & Ayr. 348; s. c. 5 Law J. Rep. (N.S.) Bankr. 56.

been given. It is contended, on the part of the petitioner, that it has, because Bignold was secretary both of the Life Office and the Fire Office, and therefore must have known of the deposit as secretary of the Fire Office. A distinction must be drawn between mere knowledge and notice to the company itself. If Bignold's interference was necessary, either for the purpose of receiving a dividend, or for any other act, then it might have been said that the knowledge of Bignold was sufficient. But there is nothing in the deed or rules of the society which shews that the interference of the secretary is necessary; and if there were two secretaries, Bignold's interference would not be at all necessary. If regular notice had been given to Bignold, as secretary of the Fire Office, he must have made some official entry of the fact, or he would have been guilty of neglect. There is a great difference between Bignold's knowing it as secretary of the Life Office, and knowing it as secretary of the Fire Office: his neglect was as secretary of the Life Office. My opinion is, that the notice is not sufficient. In *Ex parte Watkins re Kidder*, the Lords Commissioners say, that the private knowledge which one of the directors and the actuary had of the transaction, could not operate as notice of this secret trust to the company, and that therefore it was in the order and disposition of the bankrupt.

SIR J. CROSS.—It has been so often decided in transactions of this sort, that there should be some kind of notice, that it becomes necessary to require it. But the law has not said what the notice should consist of, or in what manner it should be given, therefore, it must be determined in each particular case by the circumstances. In this case, it is not suggested what would have been sufficient notice. The matter comes to the knowledge of Bignold, who was the secretary of both societies: he was the proper party to receive formal notice. A distinction has been taken between knowledge and notice. In the case of notice of the dishonour of a bill, it is nothing, to say that a prior indorsee knew of it; formal notice must be given, because the holder looks to him as responsible. If the law had required such a notice as would render a person respon-

sible, then the distinction betwixt knowledge and notice would be good. But here, no transfer could be made without the production of the certificate. It seems to me, that the circumstances of this case satisfy the exigency of the decided cases, which require some notice, and that this notice is sufficient. With regard to the second point, whether the creditor is bound by the covenants in the deed; it is insisted by the assignees that he is bound: but in what way? The assignees have no right to insist upon that, unless they say, we are the assignees of this covenant. But it is impossible that they can come in as assignees of the covenant, without being bound by it. They must pay the interest regularly, and pay the principal at the end of the time, or else the creditor would both lose the personal security of the bankrupt, and be kept out of the real estate, and lose all right to proof for the deficiency. The petitioner had a right to come in under the bankruptcy, and demand payment, subject to all the circumstances of the contract between the parties.

SIR G. ROSE.—It is quite right that the order should go as to the real estate. With respect to the certificates, there is not sufficient to displace their order for sale. If it were not for *Kidder's case*, I should immediately say that the notice was sufficient. If the assignees think it worth while to raise the question as to the proceeds, this order must be considered as not precluding them.

Order made for sale of the real estate and the shares; the petitioner undertaking not to set up this order as an objection to any claim the assignees might think right to make with respect to the proceeds of the shares.

1838. }
April 21. } *Ex parte BARNES re MEDLEY.*

Legal Mortgage—Sale—Rents and Profits.

A. B. mortgages several estates to C. D, the mortgagor continuing in possession as to some, the remainder being in the hands of tenants of the mortgagor. After the bankruptcy of A. B, C. D. obtains an order of sale, but makes no entry, and gives no notice

to the tenants, in consequence of an agreement with the assignees that he should be in the same position, as to the rents, as if he had. An auctioneer is agreed upon by both parties, who puts his man into possession. Pending the arrangements for the sale, the assignees sell separately the growing crops:—Held, that the circumstances raised a contract against the assignees, that C. D. should have the same rights as if he had made a legal entry at the bankruptcy.

Semble—There is no reason why a legal mortgagee should not have the rents and profits from the date of the order of sale, as in the case of an equitable mortgagee. Sed vide Ex parte Living (1).

In the years 1829 and 1830, the bankrupt Medley, by several assurances, mortgaged to the petitioner Barnes freehold and copyhold property, for the several sums of 15,000*l.* and 13,000*l.*, with interest, at 4*l.* per cent. per annum. In 1833, Medley paid to Barnes 3,000*l.* in part satisfaction of the mortgage debt.

On the 31st of January 1837, a fiat issued against W. Medley and A. A. Medley, his partner.

At the time of the bankruptcy part of the mortgaged premises were in the possession of W. Medley, the remainder being let to tenants. On the 25th of March 1837, Messrs. Amory & Coles, solicitors of the mortgagee, wrote to Messrs. Jones & Ward, the solicitors of the assignees, a letter, which, after referring to another indenture, proceeded as follows:—"We also beg to inquire if there be any person on the Iver estate to take care of such parts as are on hand. Of course, Mr. Barnes is entitled to the rents now due."

On the 12th of April, the solicitors of the mortgagee wrote to the solicitors of the assignees as follows:—"We have been expecting to hear from you respecting the estate at Iver, in mortgage to Mr. Barnes. We think arrangements should be making for the sale, and we propose Mr. G. Robins as the auctioneer, who would be able to advise as to the propriety of accepting Mr. Whittington's offer for part of the estate till Michaelmas or for a term. If the estate be not let, some one ought to

be put into possession to take care of it, which we will have done, unless there be some one already there. We have no wish to interfere, as we have already stated to you, unnecessarily with respect to this property, but to justify our non-interference, we must request to be favoured with a letter from the assignees or from you on their behalf, agreeing that Mr. Barnes shall be entitled to the arrears of rent due at the bankruptcy, or subsequently to accrue. We shall be obliged by an immediate answer, as we understand that at this time of the year a little delay may occasion considerable damage."

On the 19th of April there was a meeting of the assignees, at which Messrs. A. & C. attended on the part of the mortgagee, and it was agreed verbally, that Barnes was to be in the same situation as if he had given notice to the tenants at the date of the first letter of Messrs. A. & C. to Messrs. J. & W. On the same day, Messrs. J. & W. wrote to Messrs. A. & C. the following letter:—"The assignees, after you left their meeting this morning, determined on the sale of the Iver estate in mortgage, to employ an auctioneer in the neighbourhood, and have named Mr. Murray, of Uxbridge. With reference to our conversation this morning, as it may be satisfactory to you, we beg to say, that so far as the assignees are concerned, you are not to be prejudiced by our verbal communication on the subject of the rent of the estate, and shall be placed in the same situation as if you had given notice to the tenants immediately after our interview of the 10th ult., supposing you then had a right, when no interest was due to your client, to give such notice." On the 2nd of June 1837, the commissioner made the common order for sale of the premises. On the 9th of June 1837, Barnes applied to the Court of Review, and obtained an order for liberty to bid at the sale, and it was ordered that the sale should be conducted by the creditors' assignees.

Pending the arrangements for the sale, Murray, the auctioneer, by the direction of the assignees, and with concurrence of the solicitors of Barnes, sold the grass and clover on the land in hand, and on that occasion wrote to Messrs. A. & C. as follows:—

(1) 2 Mont. & Ayr. 223.

"June 23rd, 1837.

"Gentlemen—I this day sold by auction about sixty-nine acres of grass and clover upon the estate at Iver, and if it holds out near the quantities stated in the terrier, you will have to receive at least 220*l.*, after deducting the expense of selling."

The estate was sold on the 5th of July 1837, when Barnes became the purchaser for 12,000*l.* The solicitors to the assignees then objected to Barnes receiving the proceeds of the grass and clover, when the solicitors of the petitioner wrote to them the following letter, on the 25th of October 1837:—"Re Medley. We shall be glad to have the question respecting the produce of the lands in hand settled as soon as convenient. Shall we refer it to a barrister to be agreed on, upon a case to be stated between us, or in what other way do you propose to have the matter settled?" No answer was received to this letter, but the solicitors to the assignees immediately applied to Mr. Murray to pay the money over to them; and Murray having informed Messrs. A. & C. of this demand, received a notice from them not to part with the money; but upon further demand by the assignees, Murray paid over to the official assignee 136*l.* 4*s.*, the balance of the proceeds of the sale.

The petition stated, that the amount at which the estate was purchased, together with the other securities, were considerably less than the amount of principal and interest due to the petitioner upon his mortgage at the time of the bankruptcy, and that after receiving the 136*l.* 4*s.* there would still be a deficiency, which he was desirous of proving under the fiat, but he was advised that he could not do so, till his right to that sum, or other the net proceeds of the grass and clover, was ascertained by the order of the Court.

The petition prayed, that the assignees might be ordered to pay over to the petitioner the 136*l.* 4*s.*, or other the proceeds of the sale of the grass and clover received by the official assignee, together with the petitioner's costs; and, if necessary, that an account might be taken of the proceeds of the sale.

Mr. Swanson and Mr. Heathfield, for the petitioner.—The only question is, whether Barnes is entitled to the proceeds of

the growing crops sold after the date of the order of sale by the commissioner.

[The CHIEF JUDGE.—Had Barnes taken possession of the estate at the time of the bankruptcy?]

No.

[The CHIEF JUDGE.—There would be no difficulty except for the case of *Ex parte Temple* (2), and in that case there was an actual agreement that the mortgagor should continue in possession as tenant at will. I do not see any reason why a legal mortgagee should not have the same advantage as an equitable mortgagee.]

Mr. Burge and Mr. Bacon for the respondents.—A legal mortgagee ought not to have an advantage in bankruptcy, which he could not get by an action of trespass for the mesne profits. He could not recover prior to the day of the demise. Admitting that the mortgagee was not in possession, and that there was no default, there is no right of action.

[The CHIEF JUDGE.—There was no interest in arrear; but as the day of payment is passed, the mortgagee might bring an action of ejectment immediately. The mortgagee may treat the mortgagor as a tenant or a trespasser; but if as tenant, as a tenant by sufferance.]

There is no authority for the proposition that the order for sale can be treated as an entry by the mortgagee, so as to entitle him to the growing crops; see the judgment in *Ex parte Temple*.

[The CHIEF JUDGE.—The Vice Chancellor was mistaken in his law. In *Hodgson v. Gascoigne* (3) it was held, that after judgment in ejectment, at the suit of the landlord, the value of the growing crops, though sold or seized in execution, if the sale or execution were subsequent to the day of the demise laid in the declaration, might be recovered in an action for meane profits; and see *Partridge v. Bere* (4).]

[SIR G. ROSE.—The legal right is not to be looked at. Directly the mortgagee comes here for an order of sale, he comes upon a new contract. The right of entry and ejectment is abandoned on both sides; and the order of sale is made upon the

(2) 1 Glyn & Jam. 216.

(3) 5 B. & Ald. 88.

(4) Ibid. 604.

common principle, that the accessory follows the subject.]

In *Ex parte Living*, it is said, "A mortgagee has already sufficient advantages over the rest of the creditors. In equitable mortgages the mortgagee cannot enter; in legal mortgages he can, and must stand on his legal right."

[The CHIEF JUDGE.—That case went upon the ground that no notice was given to the tenants. Here, there is an agreement that the party should be in the same position as if he had given notice. The question is, when there is an order for sale, whether it is not to be of the estate as it then stands?]

Mr. Swanston, in reply.—There is no rational distinction between a legal and an equitable mortgagee. It is said, that the mortgagee did not enter. How does his forbearance prejudice his right to the estate sold at his instance? If there had been a sale of the estate and the crops together, could the assignees have called for an apportionment? Can they then, by this arrangement of selling separately, deprive him of that benefit?

[SIR G. ROSE.—His calling for a sale is an act referable to ownership.]

The CHIEF JUDGE.—This case may be decided on its own peculiar circumstances without bringing into discussion the general question, as to whether a legal mortgagee is entitled to the rents and profits from the date of the order of sale. At the time of the order of sale by the commissioners there were on the ground certain crops growing. The sale did not take place immediately, but in the interval there was a correspondence and conversation between the parties, and certain arrangements were made. Looking at the letters of the parties, it appears that the terms upon which the sale was agreed upon, were, that it should not be considered necessary for the mortgagee to take any legal steps as to the rents and profits, but that he should be considered in the same position as if he had done so. And when in his letter he takes notice that some person ought to be put into possession, and says, "that if the assignees do not do so, he will," it is quite clear, that the understanding of the parties was, that the estate was to be in the same

situation till the sale. If so, it is unnecessary to decide the general question, though, I confess, if it were not for the case of *Ex parte Living re Tombes*, I should have not the least doubt that the legal mortgagee was entitled to have the estate sold in the same position as it was when the order of sale was made.

SIR J. CROSS.—The assignees do not appear to have been in the legal possession of the estate at the time; and it is evident the mortgagee treated it as a vacant possession. The auctioneer himself had possession at the time he sold the crops, in the execution of the order which the mortgagee had obtained. Was the auctioneer the agent of both parties or not? As soon as he sells the crops, he immediately writes to the mortgagee, "I have this day sold, &c., and you will have to receive about 220*l.*," &c. The auctioneer considered himself as selling for the benefit of the mortgagee. If he had been selling for the assignees, he would have written as their agent. The assignees did not claim the proceeds at the time, and their detention seems an afterthought. It seems to have been the understanding of both parties that the estate, with the crops, was to be sold in satisfaction of the mortgage debts.

SIR G. ROSE.—The circumstances of conduct here raise a contract against the assignees, that the growing crops should be considered as security for the mortgage debt.

The petitioner's costs out of the proceeds of the sale of the crops, the surplus to the petitioner; the assignees' costs out of the general estate.

1838. }
April 23. } *Ex parte JONES re JONES.*

Fiat—Practice.

An unopened fiat annulled after the expiration of the time, on the application of the bankrupt, without costs under the circumstances.

In this case, the bankrupt was a tanner, residing at Cheltenham, and the petitioning creditor was a leather-seller, residing at Gloucester. The bankrupt assigned his

stock in trade to one Herbert, on trust, to pay all his creditors 20s. in the pound, which had been done, with the exception of some bills not yet due. It appeared that the petitioning creditor had issued a fiat, but had declined to prosecute it, on an understanding that he was to receive the sum of 47*l.*, alleged to be due on a bill, and also 25*l.* to cover the costs of the fiat; but it was distinctly sworn, that the bankrupt was not a party to the negotiation. The petition prayed, that the fiat might be annulled with costs, against the petitioning creditor. There was also an allegation in the petition, denying that the petitioning creditor had any debt.

Mr. Sturgeon, for the petitioner.

[*Per Curiam*.—Can we interfere, when the fiat has not been opened at the suit of the bankrupt?]

If not, the petitioner is without any remedy, and a person will be in a far worse condition, who has a fiat sued out against him, which is too bad to be proceeded with. While this exists, no one will pay money to the bankrupt.

[The CHIEF JUDGE.—I find they will not interfere at the office, without an order from this Court.]

Mr. Bethell, for the respondent Goodwin.—The fiat was not opened, in consequence of an understanding between the petitioning creditor and a person named Herbert, and the solicitor who appeared as the solicitor to the petition, was present at the negotiation.

[*Per Curiam*.—But it is distinctly sworn that the bankrupt was not a party.]

There is also the denial of the debt; and the costs of those affidavits certainly were not necessary.

The COURT proposed to annul the fiat with costs, as far as the non-prosecution went, leaving the petitioner to pay the costs incidental to the disputing of the petitioning creditor's debt.

It was finally agreed to take the super-seedeas without costs.

1838. } *Ex parte* LAWSON *re* MAR-
Mar. 16. } GETTS.

Practice.—*Removing a Fiat*.

The Court, on granting a fiat, issued against a trader residing in Oxford, to be executed before a commissioner in town, made the petitioning creditor undertake to pay the bankrupt's travelling expenses.

This was an application to have a commission worked in London, which had been sued out against a wine-merchant residing in Oxford.

Mr. Heathfield applied upon an affidavit of the petitioning creditor, stating that most of the creditors resided in town; and, that as most of the bankrupt's estate consisted of book debts, owing to him from persons in the University, they would be better got in, by an official assignee being appointed in London.

Per Curiam.—You may take an order, on condition that you pay the expenses incurred by the bankrupt in coming to town to attend meetings.

1838. }
April 19. } *In re* SHANNON.

Practice.—*Fiat—Attendance of Petitioning Creditor*.

The attendance of three petitioning creditors dispensed with, on the ground, that they were the only partners of their respective firms, who conducted the business, and could not, without great inconvenience, attend at the distance of forty miles.

Mr. Metcalf applied on the joint affidavit of three petitioning creditors out of four, for leave to dispense with their attendance at the opening of the fiat at Leeds, they residing at Manchester, a distance of forty miles. It was stated, that they were severally the managing partners of their respective firms; which they could not leave without considerable loss, inasmuch, that they would prefer losing their debts altogether, to having to take the journey.

Per Curiam.—This a very slight case, but inasmuch as there are three persons to travel who would be inconvenienced, you may take an order.

1838.
March 16; } *Ex parte FORSTER re FORSTER*.
April 19. }

Practice.—Supersedeas—Depositions.

It is competent to the petitioning creditor, where a bankrupt petitions to supersede, to rely upon the proceedings; and if the Court shall be of opinion that there are, upon the proceedings, the requisites to support a fiat, they will order an inquiry, notwithstanding the respondent has omitted to furnish the bankrupt with copies of the depositions.

This was a petition by the bankrupt to supersede, on the ground of there being no act of bankruptcy.

Mr. Swanston and *Mr. O. Anderdon* for the petition.

Mr. Koe, for the assignees, proceeded to read the depositions of the act of bankruptcy, not having furnished the bankrupt with copies, and not having any affidavits filed in opposition.

[*THE CHIEF JUDGE*.—These depositions are not evidence; if you wanted to make them evidence, you should have given copies, or filed affidavits substantiating them, and then the bankrupt would have had an opportunity of answering them. There must be some further inquiry.]

Mr. Koe then prayed that the petition might stand over, that the assignees might prepare affidavits of these facts.

[*Per Curiam*.—Upon payment of the costs of the day.]

Mr. Swanston objected to putting off the petition, citing *Ex parte Chambers* (1), where it was held, that the depositions could not be received.

[*SIR G. ROSE*.—If the depositions upon the proceedings carried no act of bankruptcy, you would be entitled to an immediate supersedeas; but with a little explanation, there would be a clear act of bankruptcy upon the proceedings. It is therefore right that the other side should

have an opportunity of answering the case. The Court does not make the proceedings evidence, but looks at them to govern its discretion, either in superseding or granting a new fiat immediately.]

[*SIR J. CROSS*.—When the trial comes on for hearing, it seems strange that a party should have another day to furnish evidence.]

[*SIR G. ROSE*.—It has been the practice for thirty years. Formerly, the bankrupt could not see the proceedings. The Court has a right, at any time, to call for further affidavits if it is not satisfied. The looking at the proceedings is an exercise of the discretion of the Court, for the benefit of the bankrupt; for if the depositions did not warrant the adjudication, he has a right to a supersedeas; but the assignees are to be protected, and the creditors who have proved. In *Ex parte Vypond* (2) it was held, that the respondents might rely upon the proceedings, without giving notice to the bankrupt; and the Court will look at such depositions, without permitting the bankrupt to inspect them.]

THE CHIEF JUDGE.—In *Ex parte Vypond*, there was no affidavit, and no notice given to read the proceedings; yet the Vice Chancellor directed an issue as to the act of bankruptcy. No costs of the day were given in that case. When this case was first opened, I thought it was a mistake of the petitioning creditor, and that the Court had never gone so far as to allow the petitioning creditor to rely upon the proceedings alone; but *Ex parte Vypond* establishes that the petitioning creditor was right. It has always been the practice to look at the proceedings, to see whether it is a fit case for supersedeas, or for dismissal, or further inquiry. I should be sorry to dismiss the petition upon what appears on the proceedings, but should always wish to give the bankrupt an opportunity of answering. The Court will direct further inquiry, leaving it to the party to settle what that inquiry shall be.

SIR J. CROSS.—I cannot reconcile it with a sense of justice, that the bankrupt should be put to the expense of attending the Court, and then be put off, because the other

(1) 1 Mont. & Ayr. 464; and see *Ex parte Thirkell*, 5 Law J. Rep. (N.S.) Bankr. 40.

(2) 1 Mad. 624; and which is correctly stated in 1 Mont. & Ayr. Dig. 385.

parties are not furnished with evidence, without having those expenses paid to him.

SIR G. ROSE concurred with the Chief Judge, and having looked at the proceeding, stated, that there was in the deposition a good act of bankruptcy, with a little explanation.

It was then ordered, that the petition should stand over for *viva voce* examination; and no order was made as to the costs of the day.

April 19.—On motion by *Mr. Swanston*, on behalf of the bankrupt, it was ordered, that the bankrupt should be at liberty to inspect the proceedings, and take copies, at his own expense; and that the petitioning creditor should give notice to the bankrupt of any act of bankruptcy intended to be relied on at the trial, within a certain day.

1838. }
April 19. } *Ex parte CHAPPEL re GANS.*

Bill of Exchange—Notice of Dishonour on Bankruptcy of Indorser—Appeal from Commissioner.

On a bill falling due after the bankruptcy of the indorser, and before the choice of assignees, notice must be given to the bankrupt, and, after the choice, to the assignees.

Objections may be raised before the Court of Review, which were not raised before the commissioner.

This was a petition by the assignees to expunge a proof. The bankrupt was in the habit of drawing and indorsing bills, and handing them over to an agent to get them discounted. The agent deposited several of them with the respondent Woollet as a security for his own debt. The proof was sought to be expunged on two grounds: first, that Woollet knew of the specific purpose for which they were placed in the hands of the agent; and secondly, that though some of the bills fell due and were dishonoured between the adjudication and the choice of assignees, and others after the choice, yet no notice of the dishonour was given either to the bankrupt or to the assignees.

Mr. Swanston and Mr. Archbold, for the petition.—It is admitted, that there is not

sufficient evidence to establish the fact of Woollet's knowledge of the agency; but as the only consideration for the bills was the antecedent debt of Woollet to the agent, and as no notice of the dishonour has been given either to the bankrupt or his assignees, the proof cannot stand.

Mr. J. Russell and Mr. Bacon, for the respondents.—The question of notice cannot be opened here, because it was never raised before the commissioner, and this is a court of appeal.

[THE CHIEF JUDGE.—Not for this purpose. Do you say that any of the parties who could have proved notice are dead?]

The respondent states, in his affidavit, that he believes due notice was given of dishonour of all the bills; neither the bankrupt nor the assignees make any statement upon affidavit that due notice was not given, but simply allege it upon the petition.

[SIR J. CROSS.—Your whole right rests upon proof of notice.]

There is a right of proof upon a bill before it is due.

[THE CHIEF JUDGE.—That does not exempt you from giving notice.]

It has never been decided that it is necessary to give notice in such a case; and the reason for giving notice of the dishonour of a bill would not apply to assignees, because they could not take it up.

[THE CHIEF JUDGE.—Could they not recover against a prior indorser?]

THE CHIEF JUDGE.—This proof can only be supported against Gans's estate by Woollet, as the holder of the bills. The bills having on them the indorsement of Gans, he is *prima facie* liable to pay. It is not material whether a good consideration passed to Gans; if a good consideration passed to the person who gave the bills to Woollet, he would then be entitled to prove unless a case of fraud were made out. If Woollet had been aware of the specific purpose for which the agent had the bills, that would vary the case; but that has not been made out. If, then, Woollet had been able to shew that he had taken all the steps legally requisite to entitle the holder to recover against the indorser, he might maintain his proof. But there is nothing in this case entitling Woollet, as against

Gans, to the favourable consideration of the Court, because Gans has not parted with the property for a consideration. Woollet ought to be held to as strict proof as upon an action. There is evidence of the dishonour to the acceptor, but no notice to the indorser. Though, in strictness, there is not that proof which is necessary yet there is that sort of evidence that will induce the Court to give time to produce evidence before the commissioner. The decision of the Court, in expunging the proof, will not prevent Woollet from going before the commissioner again. Though, in an appeal court, strictly so called, it is not competent to the appellant to raise any new question, yet that is not the position in which this Court is placed, if it is an appeal from the commissioner. This Court sits to hear cases as if they had never been heard before; therefore the circumstance, that the assignees, before the commissioner, did not raise the question, would not prevent their now raising the question. There was a case before this Court—*Ex parte Solarte* (1), where the assignees had not called on the party before the commissioners to establish the fact of notice, but neither had they in the petition or in the affidavits called the attention of the creditor to the point; and the Court decided, that because they had not called the attention of the opposite party to that point, the absence of the notice of dishonour must be taken as a point not in the case, though the report carries the case further; but here the petition directs attention to the question by a direct allegation. That challenge having been given, the respondent ought to have come prepared with the proof. There is a statement of notice to the agent, and merely a statement of his belief that the agent gave notice to Gans. Resting his proof in a form of equity, he fails to make out a step which would entitle him to recover at law. The proof must be reduced to 429*l.*, the amount of the bill, as to which the notice is admitted.

SIR J. CROSS.—There does not appear to me to be sufficient evidence to establish the first point, that the respondent knew that he was dealing with Gans's agent.

But inasmuch as the bankrupt is not the acceptor, but the indorser, he is not liable nor indebted to the holder, unless the holder fixes the debt upon him by strict legal notice. I entirely agree that the debt ought to be expunged.

SIR G. ROSE.—The evidence by no means warrants the way in which the petitioners shape their case as to the agency. The only question is, as to the notice. There is no distinction between the strictest rules in an action at law and the practice here. The evidence, as to the notice of dishonour, is not sufficient; and this is not a case where we ought to step out of our way, because the bankrupt's estate has received no consideration. Nothing excludes the respondent from going before the commissioner, and tendering his whole proof again. The order is not upon the ground that there is no debt, but that there is not sufficient evidence to entitle him to a verdict.

The proof to be reduced to 429*l.*, the amount of one bill, as to which notice is admitted.

1838. }
March 17; } *Ex parte* CONNELL *re* CLARKE.
April 30. }

Proof—Security, joint or separate.

A. B. and C. D., the bankrupts, keep a partnership account with a banking company, each being proprietors of shares, which stood in the books in their separate names, but which, in the deed of partnership between them, were declared to be joint property. By the deed of the company it was provided, that no shares should be held jointly, or be divided into fractional parts:—Held, that the company could not prove their joint debt against the firm, without first realizing the shares which they held as a security, and deducting the amount from the proof. Cross, J. dissentiente.

John Clarke and Thomas Parry, the bankrupts, carried on business in partnership, at Manchester, and kept a partnership banking account with the Northern and Central Joint Stock Banking Company. At the time of the fiat they were indebted to the company, on the partnership account, in the sum of 3,765*l.* 15*s.* 9*d.* for principal

-(1) 2 Dea. & Ch. 162.

and interest. By the deed of settlement of the company it was provided, that all debts and engagements with the company by any proprietor, in respect of cash balances, or running bills or notes, or on any account generally, in respect of any transaction with the company, should, in all cases, be the first lien and charge on all the shares of such proprietor, whether his own or in partnership with any other person; and the directors had power to declare forfeited, and sell, the shares of such proprietor to liquidate such debts, &c. And it was declared, that it should not be lawful for two or more persons to hold shares jointly, and in no case to divide such shares into fractional parts; and that each proprietor of shares should execute the deed of settlement. At the time of the bankruptcy, John Clarke had seventy-five shares standing in his name in the books of the company, and Thomas Parry had seventy shares standing in his name in the books of the company, some of which were purchased before their partnership, but the greater part afterwards.

On the 14th of December 1837 a fiat issued against John Clarke and Thomas Parry, under which they were declared bankrupts. At the meeting for proof of debts, Connell, the petitioner, as agent of the banking company, tendered a proof for £3,765*l.*, as a debt due from the partnership to the bank, for which they held no security, save a certain assignment, &c., and save the seventy-five shares of John Clarke and the seventy shares of Thomas Parry. The commissioners refused to admit the proof till the said shares had been sold, and the proceeds deducted from the debt. The petitioner claimed, by virtue of the deed of settlement, to hold these shares as separate and collateral securities of the individual partners, for the debt due from the partnership. Both the bankrupts made affidavits that it was agreed that the shares should be considered partnership property. The petition prayed, that the Court would declare, that the petitioner Connell, as such agent of the company, was entitled to prove the £3,765*l.* 15*s.* 9*d.*, without giving up the said shares; and that the commissioners might order to admit his proof for that sum.

Mr. Swanston and *Mr. Bacon*, for the petition.—The question is, whether these

shares were joint or separate property; and even if the assignees could shew that, as between the partners themselves, they were joint property, still it must be allowed that, as between the company and them, they were separate property.

[*SIR G. ROSE*.—You cannot retain the joint property, and prove against the joint estate. Are these shares chattels of the partnership?]

The bankrupts had contracted with the company on the representation that it was separate estate. That circumstance is in none of the other cases. The peculiarity of this case is, that the property reached the hands of the assignees, charged as separate estate. It is a separate security for a joint debt. It would have been a fraud on the part of the bankrupts to have contended otherwise, and consequently it is a fraud in the assignees. It is stipulated in the rules of the company, that all debts of the proprietors shall be the first lien upon the shares, whether the debt was contracted solely or jointly, and that it shall not be lawful for two or more to hold shares jointly. The object of that clause was to prevent any person diminishing the security the company had on his shares. How can any contract, made between the partners themselves afterwards, take away the right of the company to treat these shares as separate property? Suppose a declaration in the partnership deed, that they should be considered separate property, could the assignees have demanded them?

[*SIR G. ROSE*.—That depends upon whether you made that declaration a part of your security.]

The *CHIEF JUDGE*.—It is the general practice that a party proving against the joint estate, must first realize any joint security which he holds, deducting the amount from his debt, and proving for the difference. The simple question is, whether the property in the hands of these parties is joint property or not. If the evidence before the Court be sufficient to decide that fact, the Court will decide it; or if the parties think an inquiry will be more satisfactory, the Court will direct an inquiry. If it turn out to be joint property, the petitioners must realize their security before proof. But if there is any lien which pre-existed, in respect of the part-

ners separately, before the partnership, that must be paid first.

SIR J. CROSS.—There is no difference about the principle; the question is, how it is to be applied? Whether in this case the whole interest is joint property adversely to the rights of the present owners, or only joint property, when the assignees have recovered so much as belongs to them. If the assignees are entitled to call them in, then they are joint property. Can they call them in, when the parties contracted with the bank as separate property?

SIR G. ROSK.—The leading principle of the bankrupt laws is equalization. And it is quite idle to say, that parties are entitled by any contract to affect the general rules in bankruptcy. If, while the property was separate property, the bankrupts, by their conduct or obligation, have given any lien or equity against the property, the joint creditors cannot say that their subsequent dealings have made it joint property. But if the property is to be administered by dealing with it as the property of the partnership, no trader by his contract can take it out of that administration, because that is not a contract which the policy of the bankrupt laws allows. In my opinion, there is nothing which excludes it from being taken as the property of the partnership; and no person holding such a security can prove against the joint estate.

Mr. Temple, for the assignees.—The shares were partnership chattels by the agreement of the partnership.

[SIR J. CROSS.—Had not the company a right to consider the shares as separate property, in consequence of the contract with them?]

It has already been stated by the Court, that by the rules in bankruptcy no collateral contract will enable a creditor to prove against the joint estate, while he holds partnership property. Besides, the banking company knew that the late shares were purchased with partnership money.

Mr. Swanston, in reply.—By the stipulations of the company, every share must be held separately, and cannot be held as joint property. If there were no bankruptcy, an equity would attach upon them in favour of the company. By the fifty-second clause of the deed of settlement,

the debts to the company are made the first lien upon the shares. The contract then charges the shares, and not the person holding them, for that is the meaning of the word "lien;" and, upon the faith of that contract, the money was advanced to the partnership. But the difficulty seems to be some supposed contravention of the bankrupt laws. It is impossible for a party to say that separate estate shall be administered as joint estate, he may, however, make that joint estate which was before separate.

[SIR J. CROSS.—Could both the bankrupts sue the company for the dividends jointly?]

Suppose a partner in possession of separate real estate, he may direct it to be considered as personal; not, however, to the injury of a prior incumbrancer.

[THE CHIEF JUDGE.—That case would have answered your purpose, if the debt had attached upon the shares before they had become joint estate.]

The right of a mortgagee cannot be varied by a secret declaration.

THE CHIEF JUDGE.—The question before the Court, is not a question of the application of the principle to any other state of things than the facts before us, and it depends on the policy of the bankrupt laws, as to the distribution of the property; and one rule of that policy is, that joint property shall be distributed among the joint creditors, and separate property among the separate creditors, making a great difference between the distribution of the assets under a bankruptcy, and in other legal proceedings. Another part of the rule is, that the assets shall be distributed equally, except where any particular creditor has a previous lien, and then he has a preference over the others, so far as his lien is established before the bankruptcy. The Court takes the property as it finds it at the time of the bankruptcy, and after giving the creditors the right of a lien, divides the residue among the creditors equally. That can only be done when the creditor comes in to prove, ascertaining whether he has any security upon the joint or separate estate. So, when the petitioner proves against the joint estate, he proves his whole debt; but he must first say, I have no security. In this case he has. Then it

is the duty of the commissioner to know whether the shares are joint or separate estate. If separate, inasmuch as the separate estate would only be a surety for the joint, he is not bound to require them to be given up or sold. But if upon inquiry he finds the shares are joint property, then the creditor must either give up the security, or realizing it, deduct the amount from his proof, and prove for the residue. For the present argument, it is assumed, that it is joint property, that is, if it were now in the hands of the assignees, it must be distributed as joint property. But, says Mr. Swanston, "Though that might be the case, if the assignees were in possession of the property, yet, in the hands of the petitioner, the shares are not joint property, because they are the shares of a company of which the petitioner is the agent; and by the rules of the company, they must be held by one individual only. That would be very material, if it were proved that the shares had existed as separate property of the two, and the debt had been contracted before the partnership; the parties who were the owners of them, could not, after the lien had attached, by afterwards making them joint property, destroy the lien. But, before any portion of this debt was contracted, the property was joint property of the firm, and unincumbered. The company had a lien upon the shares, to the extent of the debt, but it was a lien upon joint property. When, therefore, they prove, they come under the ordinary rule of the bankrupt laws, that they cannot take their dividend from the joint estate, upon the whole of their debt, but must first deduct the value of the joint property which they hold. As there is some difference of opinion in the Court, this will not be considered a final judgment, but the parties may have an inquiry at once if they please.

SIR J. CROSS.—This is not a case bringing into question the general rule, that joint property is to be distributed among joint creditors; but whether as against the company, the subject is joint estate; or whether, though for the purposes of the assignees, it is joint estate, it is so for all purposes. It is an important question in this present instance, as the debt is large, and important to banking companies in

general, as the question must often arise. The beneficial property in the bankrupts, was always subject to the prior title of the company. The question is now, whether the whole value is to be called joint property or separate property, till the prior claims of the company are satisfied.

SIR G. ROSS concurred with the Chief Judge.

April 30.—SIR J. CROSS this day gave his judgment.—This is a petition on the behalf of a banking company, established pursuant to the statute. It appears, that the two bankrupts were each the holder of several shares in the bank, and that, among other terms and conditions between the bank and each individual shareholder, it was expressly stipulated, first, that no share should be held jointly, or be divided into fractional parts; and secondly, that every share should be chargeable by the bank, as a security for all debts contracted with them by any shareholder, either individually or jointly; and, that a large sum of money, forming the debt in question, was afterwards advanced on the joint account of the bankrupts, on the credit of that security.

The banking company have applied to prove a joint debt, without giving up their security upon such separate shares. This is opposed by the assignees, on the ground that the shares were joint and not separate property, having been purchased pursuant to a previous agreement between the bankrupts themselves, that the shares should be held for their joint benefit.

I believe we are all agreed about the general rule in such cases, viz. that a joint creditor, having the separate security of one bankrupt, may prove his debt and retain his security; as was decided in *Peacock's case* (1), in which Lord Eldon said, "The joint estate is primarily liable. The separate estate can only be considered security for the joint."

And it appears to me that the only question to be determined is, not whether the shares were, as between the bankrupts themselves, joint property, for that is not disputed, but whether, in the hands of the bankers, each share is not, in fact, a separate security for a joint debt. It will,

(1) 2 Glyn & Jam. 27.

perhaps, rather simplify the question, if we consider how it stands in respect to a single share. The two bankrupts agreed, that one of them should purchase it for their joint benefit. The purchaser agreed with the bank, that the share should not be held jointly, nor be divisible; and upon the faith of this, the money has been advanced. Yet, it is contended, that the right of the bank is to depend, not on the contract they themselves entered into with the shareholder, but upon the contract he made with his partner. But it seems to me, that in relation to the bank, and in all the dealings therewith, it is to be deemed and taken as separate property, by virtue of the express stipulation that it shall not be held jointly nor be divisible. And, I think, it is not competent to the shareholder to hold his share jointly with his partner, by force of a compact between themselves, adversely to any of the rights of the bank, resulting from the share being held by one instead of by several proprietors.

The question whether a share is to be deemed a joint or a separate security, being, as I conceive it is, rather a question of fact than of law, former decisions will not afford us much assistance. But there is one, I mean *Bowden's case* (2), in which it was determined by this Court, that after one of two partners had mortgaged his separate property for a joint debt, and then devised it to the other, who became bankrupt, the interest of the mortgagee remained *in statu quo*, and the proof and the security were both allowed as a double charge on the same bankrupt's estate. In the present case, it appears to me quite immaterial, whether the agreement between the partners, that the share should be joint property, was prior or subsequent to the compact with the bank, that it should not be joint nor be divisible. I am therefore of opinion, that every one of these shares is a separate and not a joint security, and that for all the purposes of security to the bank, it must be deemed separate and not joint property; and consequently, that the bankers are entitled to prove their debt against the joint estate, without surrendering up the shares to the assignees.

(2) 1 Dea. & Ch. 135.

March 16; } *Ex parte* HARRISON AND
April 24.. } OTHERS *re* MEDLEY.

Equitable Mortgage—Reputed Ownership—Notice—Company.

Equitable mortgage coming for a sale must submit to the whole jurisdiction; otherwise the Court will not entertain his petition.

The knowledge of a director of a company, who was interested, and of the secretary, without whose intervention the shares could not have been transferred,—Held, sufficient notice to take the shares out of reputed ownership, the mortgagees being in possession of the certificates.

In 1834, a company, called the Stanhope and Tyne Railway Company, was formed, for the purpose of working coal mines, &c. in the county of Durham, and for that purpose had purchased freehold and leasehold property, which was vested in trustees. The petitioner, John Fairweather Harrison, was the resident managing director in London of the said company. The other petitioners were the partners constituting the firm of Esdaile & Co., bankers in Lombard-street, London. The bankrupt, William Medley, and Thomas Scott the younger, carried on business in London in partnership, as bill-brokers, under the firm of Medley, Scott & Co. Prior to September 1836, the petitioner Harrison, as such director, sold to Medley eighteen shares of the said company, which were transferred to him, and, at the time of the bankruptcy, stood in his name. Two other shares were contracted for by the bankrupt, but the purchase-money not being paid, they were not transferred to him. In September 1836, Medley applied to Harrison to accept a bill for 2,000*l.* for his accommodation, engaging to pay the same when due, and to deposit the aforesaid twenty shares with Harrison as an indemnity. A bill for 2,000*l.*, dated Sept. 6, 1836, was drawn by one Rose at four months' date upon Harrison, and accepted by him; and Medley thereupon delivered to Harrison the following letter:—

"Sept. 6, 1836.

"In consideration of your accepting on my account the draft of Mr. Rose for 2,000*l.*, dated this day at four months, due Jan. 9, 1837, I hereby engage to provide

for the same at maturity, and I lodge in your hands twenty Stanhope and Tyne Railway shares as a collateral security."

It was stated by Harrison, that, at the same time, Medley authorized his clerk to deliver the certificates of the shares to him; that they were not delivered, but allowed by Harrison to remain with Medley on his behalf, it being impossible, from the situation held by Harrison, that Medley could effectually dispose of the shares without the knowledge of Harrison, or his having the means to prevent him. On the 15th of December, Medley applied to Esdaile & Co. to discount the bill, which they did. Shortly before the bill became due, Esdaile & Co. sent to Medley & Co. to inquire, whether the bill would be paid on its falling due, when Thomas Scott the younger represented that Harrison held a security on the Stanhope and Tyne Railway shares, expressly to secure payment of the acceptance, and that the shares belonged to Harrison; and, at the request of Esdaile & Co., Scott, on behalf of Esdaile & Co., delivered to them the certificates of the eighteen shares, with a letter as follows:—

"London, Jan. 5, 1837.

"Gentlemen,—We beg to hand you herewith eighteen Stanhope and Tyne Railway shares, and we will further furnish you with two more when we receive them from Mr. Harrison; the above-mentioned shares to be held as a collateral security for the payment of a bill for 2,000*l.*, accepted by Mr. Harrison, due 9th of January; and, in default of payment, we hereby authorize you to sell the said shares, and repay yourselves.

"Medley, Scott, & Co."

"To Sir J. Esdaile & Co."

Harrison, shortly before the bill became due, applied to Medley for cash to provide for the same: Medley thereupon stated, that the bill would be got up or retired, and that it was in the hands of Esdaile & Co., and proposed, that Harrison should accept another bill for 1,800*l.*, which he would place in the hands of Esdaile & Co., in order that the acceptance falling due might be provided for. Harrison accordingly accepted a bill for 1,800*l.*, drawn upon him by Edward Harris; and, it was agreed, that it should be deposited with Esdaile & Co., that, with the proceeds thereof, and a further sum to be provided

by Medley, the acceptance for 2,000*l.* might be taken up.

On the 9th of January 1837, Harrison having asked Scott the younger for the certificates of the eighteen shares, was informed by him, that they were lodged with Esdaile & Co. as a collateral security for the acceptance of 1,800*l.* Harrison received no consideration for either of his said acceptances, except the aforesaid security by way of indemnity. Harrison stated the eighteen shares remained with Esdaile & Co. as a security for 1,800*l.* acceptance, with his sanction, and that the Railway Company, through him, had notice on the 9th of January 1837, that the said certificates were deposited with Esdaile & Co. as such security as aforesaid. On the 27th of January, Harrison, with the knowledge of Esdaile & Co., wrote and delivered to G. W. Harrison, the secretary of the company, the notice as follows:—

"To the Directors of the Stanhope, &c.

"Gentlemen,—I hereby give you notice, that I claim eighteen shares in your company, numbered 1018 to 1035, under and by virtue of a written agreement or deposit by Mr. W. Medley, bearing date the 6th day of September last.

"J. F. Harrison."

On the 31st of January 1837, a fiat issued against Medley. The act of bankruptcy was on the 26th of January, so that this last notice was inoperative. The last-mentioned bill fell due on the 12th of March last, and was not paid by Medley or the drawer. The petitioners had applied to the assignees to join with them in selling the shares, and applying the proceeds in payment of the acceptance; but they had declined to do so, alleging them to be the property of the bankrupt.

By the deed of settlement of the company, it was provided, that no person could become a proprietor of shares unless he were first approved of by the directors, and that the name of the individual to whom the shares were to be transferred, and the number of such shares, must be communicated through the secretary to the directors, who might approve or disapprove of the transfers thereof. It was alleged, that, for many years past, all such applications had been received by Harrison, and that, under such circumstances, it would have been impossible for the

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bankrupt to have transferred the shares standing in his name without the privity of Harrison; and, if such an application had been made, Harrison would have taken measures to prevent the same, till satisfaction had been made by the bankrupt for the said last-mentioned bill for 1,800*l*.

The affidavit of G. W. Harrison, the son of the petitioner Harrison, stated, that he was secretary to the company, and that for the last three years he had assisted his father in the management of his affairs, and that, looking over his father's bill-book, he found that he had accepted the bill of the 6th of September 1836, and his father informed him, that it was given for the accommodation of the bankrupt, and that, as a security, he held a letter of the bankrupt of the 6th of September 1836, which letter his father then delivered to the deponent; and that he, knowing that his father held those shares as a security, would not, while his father's engagements remained outstanding, have permitted the bankrupt to receive any dividend which might have been declared in respect of the said shares, or to transfer the same without the express authority of his father.

It was contended also, that the shares so standing in the name of the bankrupt, were chattels real, being an interest derived from lands and hereditaments, and not of a personal nature, or within his order and disposition at the time of his failure.

The petition prayed, that J. F. Harrison and Esdalle & Co., the petitioners, or one of them, might be declared equitable mortgagees of the eighteen shares then standing in the name of Medley in the books of the said company, and that the commissioner might take an account of the principal, interest, and costs, due upon such mortgage, and that the shares might be sold, and the proceeds of the sale applied in satisfaction of what should be found due to the petitioners, with liberty to prove for any deficiency.

Mr. Swanston, with whom was *Mr. J. Russell*, for the petition, having stated the case,—

Mr. Burge and *Mr. O. Anderdon*, for the assignees, submitted, that the petitioners should submit to the whole jurisdiction.

Mr. J. Russell, *contra*.—If the petitioners were to go to a court of equity for specific performance, and the bill were dismissed with costs, they would not be pre-

cluded from trying their right at law, and parties are never put to any election there before the Court will hear the case. It is not a matter of indulgence; an equitable mortgagee has a right to come here.

[*SIR G. ROSE*.—The application of an equitable mortgagee here is not a matter of right, especially when there are objections to the title: it is only matter of convenience and indulgence, because he gets a proof in addition to his security, and, therefore, he is always put under terms. Where there are objections to the title, the question ought not be entertained till the party agrees to give up the property if necessary.]

Per Curiam.—Let the petition stand over, to see if the parties will submit to the jurisdiction; and, in the meantime, let the shares be sold, and application made as to the proceeds.

April 24.—The parties having agreed to submit to the jurisdiction, the case now came on for hearing.

Mr. Swanston and *Mr. J. Russell*, for the petitioners.—There are two questions—first, whether these shares were real or personal property; and, secondly, whether, if personal, sufficient notice has been given. If the petitioners succeed on the second point, there will be no necessity to argue the first. Was there, then, sufficient notice given before the bankruptcy? It was in the knowledge of Harrison, the resident London director, and of his son, who was secretary to the company, who states, that he would not even have permitted the bankrupt to receive the dividends without the express authority of his father.

[*Per Curiam*.—The deed of settlement does not seem to have pointed out any mode in which notice is to be given, and no regular practice appears to be observed; therefore, it is a question of fact, according to the particular circumstances of the case.]

There has been ample notice according to the cases—*Ex parte Stuart* (1), *Ex parte Waithman* (2), *Smith v. Smith* (3). As to *Ex parte Watkins re Kidder* (4), the Lords

(1) 2 Mont. & Ayr. 60.

(2) *Ibid.* 364.

(3) 4 Tyrw. 53; s. c. as *Smith v. Masterman*, 2 Law J. Rep. (N.S.) Exch. 42.

(4) 2 Mont. & Ayr. 349; s. c. 5 Law J. Rep. (N.S.) Bankr. 56.

Commissioners had no jurisdiction in that case, as it was a question of fact.

Mr. Burge and Mr. O. Anderdon, for the assignees.—Harrison, the son, obtains his knowledge in the capacity of his father's clerk, and not as secretary to the company. When Harrison, the father, gave notice, the shares were not in his possession, but were clearly in the order and disposition of the bankrupt, who hands them over to Esdaile & Co. as a security. The notice must be given by, and enure to the person claiming the beneficial interest in the securities.

[*SIR G. ROSE*.—When the property is taken out of the reputed ownership for any purpose, is it not for all other purposes? I think it clearly is.]

[*THE CHIEF JUDGE*.—If the shares, when sold, did not realize sufficient to cover the amount of the bill, then Esdaile & Co. would come upon Harrison for the deficiency; so that he is interested in the shares.]

There is no notice here to take it out of the hands of the assignees, who, by the assignment to them, are considered as acquiring the rights of incumbrancers, or purchasers for valuable consideration.

THE CHIEF JUDGE.—The subject-matter of the petition is the proceeds of certain shares, sold by the order of the Court, and which the petitioners claim by virtue of an equitable lien, acquired by a deposit of the certificates, and which the assignees claim as part of the bankrupt's property, either as never having been sufficiently pledged, or as still in his order and disposition. The shares in question, of course, could not be deposited, but the certificates were deposited with the bankers on the 5th of January 1837, as a security for a bill which they had discounted for the bankrupt; and, in pursuance of the previous agreement between Medley and Harrison, that they should be a security for the bill of 2,000*l.* Medley had been allowed by Harrison to retain these shares in his own hands; but, Esdaile & Co. having discounted the bill, and the bankrupt not being in a condition to pay, stated, at the time of the deposit, that these certificates represented the property of Harrison by virtue of a previous agreement. These shares then were in the hands of Esdaile & Co. as a security for 2,000*l.* at that time. Suppose bankruptcy had taken place, were

they in the order and disposition of the bankrupt? At that time, Harrison was acting director of the company; and it is stated by him, that no transfer could be made without his knowledge; and it is further stated, that the bankrupt, having written to Harrison, mentions the deposit for securing the 2,000*l.*; and Harrison, the son, who was the secretary of the company, had that paper handed over to him, whereby there was notice to him of the fact of the shares having been pledged as a security for 2,000*l.* If, at that time, bankruptcy had taken place, could it be said that the company had not notice? It is a sufficient answer to *Ex parte Watkins* to shew a distinction. In that case, Allen, whose knowledge was said not to amount to notice, had no interest in the question. It was a mere casual knowledge, and no official notice which would justify him in interfering with the transfer of the shares, or the payment of the dividends; and, besides, the bankrupt was in possession of the certificates. But, in this case, Harrison states, that no transfer could be made without his knowledge, and the secretary likewise states, that he would not have allowed the dividends to be paid, without the direction of the petitioners. Then, there is that knowledge or notice to the officer of the company, which would prevent that act being done, which gives him any power over the shares. At that time, there was sufficient notice to the company, that these shares had been pledged for the 2,000*l.* But, then, it is said, that, though that is true with respect to the 2,000*l.*, it is not true as to the 1,800*l.*, because that transaction took place at a different period. But it is the same debt. The 2,000*l.* bill not having been taken up by the bankrupt, another bill is drawn for 1,800*l.*, and accepted by Harrison, and left in the hands of Esdaile & Co. as a security for 1,800*l.*, advanced by them, and the shares also are left in their hands, not from any want of recollection on the part of the bankrupt, but expressly as a security for 1,800*l.*, for he states that to Harrison himself, and Harrison says, that they were so left with his assent; and, all parties agreeing to that, they so remained to the time of the bankruptcy. To whom did they belong? Can Harrison and Esdaile & Co. insist that the produce should be applied to

the payment of the bill? or can the assignees insist that they are the property of the bankrupt? If it is sufficiently shewn that they were a security, the only answer that can be given is, that under the 72nd section of the Bankrupt Act they were in the order and disposition of the bankrupt: but what order or disposition over them could the bankrupt have had? The managing director had knowledge, and the secretary of the society had notice from the director, that they were pledged for 2,000*l*. It seems to me, that there is nothing which constitutes reputed ownership, because all the persons to whom reference might have been made, would have told that they were pledged as a security. The petitioners, therefore, are entitled to the proceeds in reduction of their debt.

SIR J. CROSS.—There is no question that, as against the bankrupt himself, the petitioners would be entitled to the property, and the assignees have no more right than the bankrupt except under the 72nd section. In order, therefore, to establish their title to the property of the petitioners, the burden of proof is on them, that the case comes within the 72nd section. The assignees insist that, though the certificates were the only badge of property, and these were out of the bankrupt's hands, that yet he had possession of the property. What was in his order and disposition? of what was he reputed owner, and with whom? Reputed ownership must be collected from the evidence. I am of opinion that the assignees have not made out a case against the primary right of the petitioners.

SIR G. ROSE.—All questions of reputed ownership are questions of fact, but to be got at by attending to the analogy of reported cases. In the cases generally arising, there is a regular course marked out as to the notice, as in the case of an assignment of a bond, or policy of insurance, or interest in the residue of an estate. It is impossible to lay down a direct rule that is to be followed up in a case like this, where possession of goods and chattels must be evidenced by the certificate. It might be said, that this was a symbolical delivery, and that the transfer was complete thereby. Is the state of things such between the company and

Harrison that the assignees in bankruptcy are entitled to say, the bankrupt has not made a transfer of the goods; and we will consider ourselves as purchasers for valuable consideration, so as to call for an assignment? We must consider whether every act has been done by the persons claiming the shares to interpose a check upon the transfer, as in the ordinary case, where a trustee has notice that there has been an assignment of the interest. There has been no neglect, and the company had a right to prevent the transfer to assignees either for valuable consideration or by operation of law. I took an opportunity of asking in the course of the argument, whether there was any precise mode in which notice was to be given; for, if so, it would raise a question, whether that was not the only form in which it could be given. It was conceded that no specific form was laid down. Then, what is to satisfy the rule as to order and disposition? Upon what principle can it be said, that notice to one director does not meet the necessity of the case? particularly when our attention is called to the certificate, which carries intrinsic evidence as to what will satisfy the rule; for, on the back of the certificate is a printed notification, that no transfer shall be made without the consent of the directors. The legal operation of that is, that the consent of the whole of the directors is necessary for a transfer. Is there not here notice given of a transfer to one of the directors? and is not the duty cast upon him of attending to it? If so, *à fortiori*, on the principle of a trustee,—and it is directly operative, where given to a trustee in respect of his own interest,—there is the strongest necessity of the claim being attended to by the direct interest. Whatever may be the question of notice as given to individuals, in this case, the mode to be followed must be by giving notice to the parties, who, by the constitution of the company, can prevent the transfer being made. The other side do not point out another mode. It is in evidence that the secretary considered himself authorized to prevent the dividends being received. Every notice has been given to prevent the operation of the statute.

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IN THE

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— Residue to R. S., an infant, on his coming of age, failing him to the next male child of P. S. who should attain twenty-one, failing such child to A, B, C, and D. Dividends to be applied towards maintenance of R. S. during minority. On death of R. S., whilst an infant, living P. S., who has no son, accumulations of income beyond that permitted by Thellusson Act, go to next-of-kin, as undisposed-of residue, Ch. 173

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— Not forfeited by bankruptcy, where clause of forfeiture in case legatee should mortgage, charge, sell, or expose to sale, assign, or incur, Ch. 187

— 300*l.* per annum to A. during his life; to B. and C. 150*l.* per annum each during his life; in case either B. or C. die, the other to inherit the whole 300*l.*; if A. die without issue, B. and C. to inherit from A.; testator declaring that the reason why he left only the interest to A. B. and C. was, that if they died without issue, the money might go to X, Y, and Z. The gift to X, Y, and Z, being declared too remote, A. takes an annuity for life only, Ch. 195

— Plate to two legatees to be divided between them, share and share alike, and upon demise of either, without lawful issue, her share to the other: surviving legatee entitled to the whole where one dies in lifetime of testator. Case of cumulative legacies, where gift by will of annuity to two daughters, and by codicil, after the death of one of the daughters, of a further sum for life to the other, Ch. 212

— Residue to infant on his coming of age, failing him, over, income to be applied for his maintenance, education, and benefit, as executors should judge most advantageous for him; infant not entitled to whole income accruing during his life, if he die under age, Ch. 217

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— Legatee on attaining twenty-one, absolutely entitled to accumulation of interest, under residuary bequest, to be paid into her hands on attaining the age of twenty-five, and not till then, unless she married, the whole property then to be settled on her and her children, Ex. 20

— Devise of real estate to executors in trust, that testator's wife should receive rents for maintenance of his son and daughter till twenty-one, on second marriage of wife, to his son in tail only, yielding and paying unto testator's daughters M. and E. each 100*l.* Legacy of M. vested, where she attains twenty-one, marries, and dies before E. attains twenty-one. Ex. 33

— Intestacy as to residue after payment of 50*l.* a year to testator's widow, and 500*l.* to his daughter, where, by will, he bequeaths the whole of his property to A. and B. for his wife and daughter, adding, "namely," I give to my wife 50*l.* a year for her life, and 500*l.* to my daughter at twenty-one, Ex. 58

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